Supreme Court, U.S.
FILED

NO. 95 11 96 JAN 22 1996

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SCOTT McLAUGHLIN, LIBERTARIAN PARTY OF NORTH CAROLINA, THE LIBERTARIAN PARTY, and KATHLEEN FERRELL,

Petitioners,

–v–

NORTH CAROLINA BOARD OF ELECTIONS and WILLIAM A. MARSH, Jr.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in a state where major political parties are given substantial financial and other direct benefits in addition to automatic ballot access without imposing any burden on them not shared by minor political parties, election laws which limit major party status to those polling ten percent (10%) of the vote for their candidate for governor or president, five times the degree of support required for initial ballot access, violates the First and Fourteenth Amendment rights of small parties?

II. Whether, in a state where the existence of voters registered as affiliated with a political party provides state funded benefits to the party, election laws which terminate the right of a minor party to maintain and record new voter affiliations on registration rolls during periods when it has temporarily lost its official recognition as ballot qualified and is striving to regain ballot access by petition are constitutional, as held by the Fourth Circuit in this case, or are an invidious discrimination in favor of the two major parties in violation of the First and Fourteenth Amendment rights of small parties, as held by the Tenth Circuit?

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NORTH CAROLINA BOARD OF ELECTIONS and WILLIAM A. MARSH, Jr.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Scott McLaughlin, Libertarian Party of North Carolina, The Libertarian Party and Kathleen Ferrell, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on 27 September 1995. The Fourth Circuit denied Petitioner's timely filed petition for reconsideration on 24 October 1995.

CITATIONS TO OPINIONS BELOW

The opinions below are reported. McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215 (4th Cir. 1995); McLaughlin v. North Carolina Board of Elections, 850 F. Supp. 373 (M.D.N.C. 1994).

JURISDICTION

The opinion of the Fourth Circuit was issued on 27 September 1995. Petitioners timely filed petition for rehearing was denied on 24 October 1995. Petitioners sought declaratory and injunctive relief claiming that various election laws violated rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. The district court had subject matter jurisdiction, 28 U.S.C §§ 1331, 1343 and 2201. The Fourth Circuit had jurisdiction over the appeal from final judgment, 28 U.S.C. § 1291. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of the North Carolina statutes involved are set out in the appendix to this petition.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

On 22 February 1993, Petitioners filed a complaint in the United States District Court seeking a declaration that certain provisions of the North Carolina elections laws in N.C.G.S. §§ 163–96, 163–97 and 163–97.1 deprived them of rights guaranteed by the First and Fourteenth Amendment and injunctive relief from their enforcement. The action was brought against the North Carolina State Board of Elections [BOE] and its acting director by The Libertarian Party [national Party], the Libertarian Party of North Carolina [state Party], Scott McLaughlin, a member of the state Party executive committee and its 1992 candidate for governor, and Kathleen Ferrell, a voter who seeking to retain her registered affiliation with the Libertarian Party.

Based on stipulated facts, the parties' motions for summary judgment were referred to Magistrate Judge Eliason. On 25 February 1994, he issued findings and an opinion, recommending that the part of N.C.G.S. § 163–96(b) requiring notarization of the signatures of voters on party ballot access

petitions and a 5¢ per signature verification fee be declared unconstitutional and that Petitioners' other claims be dismissed. On 19 April 1994, District Court Judge Richard C. Erwin issued an order adopting the findings and recommendations of the magistrate and entered final judgement granting Petitioners declaratory and injunctive relief from enforcement of the limited portions of N.C.G.S. § 163–96(b) recommended by the magistrate and dismissing Petitioners' other claims.

Petitioners filed notice of appeal on 19 May 1994. The Fourth Circuit issued a decision affirming the district court on 27 September 1995. On 24 October 1995, the Fourth Circuit denied the petition for reconsideration.

II. STATEMENT OF THE FACTS.

This action was filed following the general election of 3 November 1992. Prior to the election, the Libertarian Party took the steps required by N.C.G.S. § 163–96 to be certified as a "new" political party (for the fourth time), filing petitions signed by registered voters equal to more than 2% of the total vote for Governor in the preceding election. As a result, its candidates for federal, state and local offices appeared on the ballot. Based on the failure of its candidates for Governor and President to poll more than 10% of the votes cast, the North Carolina election laws terminate the Party's status as a party who may nominate candidates for subsequent ballots and have voters register their affiliation with it and forces voters

registered Libertarian to change their registration to "unaffiliated" or, at their option, as affiliated with one of the two major political parties. N.C.G.S. §§ 163–97, 163–97.1. The district court and the Fourth Circuit held the challenged provisions of the election laws to be constitutional, dismissing Petitioners' claims that they violate their rights under the First and Fourteenth Amendments.

A. Political Party Status Under the North Carolina Election Laws.

1. Administrative Control of Elections and Ballot Structure.

North Carolina holds an election for federal, state and county offices in November in even numbered years. At each, voters elect members of Congress, the state legislature, and county officers. At every other election, voters elect officials serving four year terms, including President and Governor.[1] A primary election is held in May to select the candidate from each political party whose name will appear on the general election ballot for each office. N.C. Const. Article II, §§ 1, 2 4, 8 & 9 and Article III, §§ 2 & 7; N.C.G.S. § 163–1.

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[1] The Governor is chosen in the same election year cycle as the President. Elections where voters elect the President and Governor will be referred to as gubernatorial elections and the others as off–year elections. North Carolina holds municipal elections in odd numbered years. Thus, there are four general elections, two state and two municipal, in each four year gubernatorial election cycle.

North Carolina has enacted a complex set of election laws regulating voter qualification and registration and the selection and eligibility of candidates. The responsibility to enforce and decide disputes arising out of them laws is placed in the BOE, a five member agency appointed by the Governor. N.C.G.S. §§ 163–19 through –22.1. Under control of the BOE, responsibility to apply and enforce them in each county is placed in three member county boards of elections. County boards appoint three local election officials in each voting precinct, a registrar and two judges of elections, to supervise and control voting in the precinct.[2]

Voters register in the precinct of their residence. Records recording name, address, age, sex, race, date of registration and party affiliation are maintained and constantly updated by the county boards. A voter who moves to another county must register in that county and cancel prior registrations. Voters are purged based on cancellation notices, by quarterly lists of those deceased and those convicted of

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[2] The election laws are designed to ensure that the BOE and county boards are controlled by the two major parties, with a one member majority for the Governor's party. The statutes permit only thee members of the BOE, two members of a county board and two of a precinct's officials to belong to the same party, and require all be appointed from lists submitted by chairmen of the two parties having the highest number of registered voters statewide. N.C.G.S. §§ 163–19, –30, –41 and –47.

felony, and by removal of those failing to vote in two successive gubernatorial elections. Voters must report, and the county boards must change records, upon a change of name or address. Party affiliation is changed at the request of a voter. N.C.G.S §§ 163–54 to –55 and 163–65 to –74.

The ballot is structured to give prominent mention of a candidate's affiliation with a "ballot qualified" party.[3] Ballots are printed in parallel columns, with the name of the party at the top and of its nominees for office below. Immediately below the party name is a place to mark a single "straight ticket" vote for that party's nominees for every office. Columns are assigned in alphabetical order for parties with at least 5% of the statewide voter registration. A party with less than 5% registration is assigned a column at the right. Individuals qualifying by petition for a particular office are listed in a separate column under the title "Unaffiliated Candidates." N.C.G.S §§ 163–140(b) and 163–140.1.

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[3] The election laws use two definitions of "party." The term "ballot qualified" party in this petition refers to the definition under the laws qualifying a party to appear on ballots and have voters register as affiliated with it. Ballot qualified status was lost by the Libertarians under the statutes challenged in this action. A broader definition of "party" applies to N.C.G.S. Chapter 163, Article 22A, regulating political contributions. It continues to cover the Libertarian Party despite its loss of ballot qualified status.

2. Political Party Ballot Access.

North Carolina has two categories of ballot qualified parties. To qualify as "new," a party must file with the BOE petitions signed by registered voters equal to at least 2% of the total votes cast in the last election for Governor and certificates of the chairmen of county boards of elections attesting that the signatures were compared to voter registration records and the number found to be qualified and registered to vote.[4] N.C.G.S. §§ 163–96(a)(2) and (b). When the requirement is met, the BOE certifies that the party qualifies as a "new" political party whose nominees will appear on the general election ballot.[5] At the first general election following qualification, the "new" party nominates its candidates by state party convention and cannot nominate by

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[4] The number of voter signatures necessary for a "new" party petition was set at 10,000 in 1937, reduced to 5,000 in 1981 and raised in 1983 to its present level of 2% of the number voting at the last general election for governor.

[5] The term "new" political party is used to refer to a party which became ballot qualified by petition under N.C.G.S. § 163–96(a)(2). "New" is a misnomer. Parties like the Libertarians, which have a twenty year continuous existence and were ballot qualified in the past, are required to repeatedly seek ballot qualified status by petition as a "new" party after their ballot qualified status is terminated by statute.

primary election. N.C.G.S. § 163–98.[6] Certification as a "new" party allows voters to register as affiliated with it.

The other category of ballot qualified party is one whose nominee for President or Governor received at least 10% of the total vote cast for that office at the last election. N.C.G.S. § 163–96(a)(1).[7] The ballot qualified status of a party is terminated when its nominees for those two offices fail to poll at least 10% of the statewide vote.

> When any political party fails to poll for its candidate for governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for governor or for presidential electors at a general election, it shall cease to be a political party within the meaning of the primary and general elections laws and all other provisions of this Chapter.

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[6] No provision permits a small party, not qualified for statewide ballot access, to nominate candidates for local offices by showing support in a local area. N.C.G.S. §§ 163–122 & –140(b) (candidates qualifying for a local office by petition of registered voters in the local district must be listed on the ballot in the column for "Unaffiliated Candidates").

[7] Polling more than 10% of the vote for any other office does not serve to protect the party's status as ballot qualified even for that office. Indeed, under the laws, a candidate of a "new" ballot qualified party elected at an election where the party's candidates for governor and president got less than 10% would have to run for reelection as "unaffiliated."

N.C.G.S § 163–97.[8] Termination of ballot qualified status mandates the change of the registration of those affiliated with the terminated party to "unaffiliated."

> The State Board of Elections shall be authorized to promulgate appropriate procedures to order the county boards of elections to change the registration affiliation of all voters who are recorded on the voter registration books as being affiliated with a political party which has lost its legal status as provided in G.S. 163–97. . . . All voters affiliated with such expired party shall be changed to "unaffiliated" designation by the State Board's order and all such registrations shall be entitled to declare a political party affiliation as provided in G.S. 163–74(b).

N.C.G.S. § 163–97.1[9]

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[8] This is one of the statutes challenged in this action. Only the Democratic and Republican Parties have ever achieved this status. The term major party is used in this petition to refer to such parties and the process by which they continue their ballot qualified status for another four year election cycle will be referred to as retention. As shown below, retention provides a constellation of benefits with no offsetting liabilities. It is the provision of benefits with no liabilities exclusively to the two major parties which is the basis for Petitioners' claim that the 10% vote provision operates as an invidious discrimination against small parties.

[9] This is one of the statutes challenged by Petitioners in this action. The BOE has temporarily held off enacting the mandated administrative regulation to disaffiliate Libertarians while this action is pending.

Ballot qualified major parties and "new" parties remaining ballot qualified for a second general election following their certification chose nominees for offices by primary election.[10] The State and counties pay all of the costs of conducting primary elections. N.C.G.S. § 163–105. The laws impose no requirements for county or local party structure or meetings. A voter may vote only in the primary of the party with whom he is affiliated in his voter registration. Those registered "unaffiliated" may vote in the primary of a party whose internal rules permit voting by such voters. N.C.G.S. § 163–59 and 163–74(a1).

3. Other Benefits to Ballot Qualified Political Parties.

In addition to ballot access and the right to register affiliated voters, ballot qualified status provides other benefits.

County boards of elections update the lists of registered voters by adding newly registered voters, purging those no longer qualified to vote and recording changes in address, voting precinct, name and party affiliation. Ballot qualified

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[10] Because termination of ballot qualified status comes from a failure to poll 10% of the vote at a gubernatorial election, "new" party status is limited to a four year cycle. If a "new" party is certified prior to an off–year election, it must select nominees for the off–year election by convention and nominees for the gubernatorial election by primary. The conclusion of the courts below primaries are limited to major parties, who met the 10% vote requirement, is incorrect.

parties are entitled to a free copy of the printed list every two years from each county board. In the 94 (of 100) counties which maintain registration lists on computer, ballot qualified parties are entitled to a free copy of the current printed list and to a computer disc containing name, address, sex, race, age, party affiliation and precinct of every registered voter once each odd-numbered year and twice each even-numbered year. N.C.G.S § 163-66.

Public tax funds are put in the North Carolina Political Parties Financing Fund. Each taxpayer has the option to have $1.00 of his income tax segregated from general revenues and credited to the fund. Money deposited in the fund is allocated quarterly among political parties on a pro rata basis based on the number of voters registered as affiliated with that party. Parties entitled to a pro rata allocation of the fund are those qualified for ballot access, those whose candidate for Governor or President received at least 10% of the total vote cast for that office at the last general election and those who qualified as "new" parties under the § 163-96 petition process by July 1 of the prior year. N.C.G.S. § 105-159.1.[11]

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[11] Money allocated to a party, paid by the BOE to its state chairman, may be used to support the party and its candidates at a general election but not for expenses associated with a primary election. N.C.G.S. §§ 163-278.41 through -278.45 (Article 22B of Chapter 163).

4. Obligations on all Political Parties.

Losing ballot qualified status under N.C.G.S. § 163–96 and –97 doesn't free a party of regulation. Extensive regulation and reporting requirements apply to contributions and expenditures for political purposes by any "political committee." N.C.G.S. §§ 163–278.6 through –278.36 (Article 22A of Chapter 163). By definition every political party is a political committee and "political party" expressly includes those not ballot qualified under § 163–96. A political purpose is defined to include any purpose in aid of any political party. N.C.G.S. §§ 163–278.6(14), (15) and (16).

Article 22A requires a party to report the name and address of its treasurer to the BOE. He must maintain current records of all contributions, loans and expenditures and must file a statement of organization (name, address and purpose of the party; name, address and relationship of every affiliated party; and name and number of all bank accounts) and detailed financial reports of contributions, loans and expenditures prior to each primary, prior to each general election and annually. N.C.G.S. §§ 163–278.7(a), –278.7(b), –278.8(a), –278.9. A party may not receive corporate contributions, may not receive anonymous contributions above $100.00 and may not receive contributions in excess of $100.00 unless made by check or money order. N.C.G.S. §§ 163–278.14 and 278.15. Failure to comply with the provisions of Article 22A subjects

the party and its treasurer to criminal penalty. N.C.G.S. § 163-278.27.[12]

B. Libertarian Party Status in North Carolina.

The national Libertarian Party regularly holds national conventions, has a national political platform and has successfully supported candidates for public office. The state Party was formed in 1976 and has participated in general elections in North Carolina ever since.

Prior to the 1976 election, the Party qualified as a "new" party by filing the required petitions and nominated a candidate for President. Its candidate failed to poll 10% of the vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration. Prior to the 1980 election, it qualified as a "new" party by filing the required petitions and nominated a candidate for President. Its candidate failed to poll 10% of the vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration. Prior to the 1984 election, it qualified as a "new" party by filing the required petitions (raised to 2% of the total votes cast for Governor in the prior general election) and nominated a slate of candidates for

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[12] In compliance with Article 22A defining it as a party, though deemed to have ceased to be a party for ballot access and voter registration purposes, the Libertarian Party is subject to the limitations on contributions and is required to, and continues to, file the required financial reports with the BOE.

office, including President and Governor. Its candidates failed to poll the 10% threshold vote. By statute, it was deemed to have ceased to exist for purposes of ballot access and voter registration.[13]

Prior to the 1992 election, in a process taking a year and costing $42,000, the Party again qualified as "new" by filing petitions containing 43,620 valid signatures and nominated a slate of candidates for federal and state office. It was certified by the BOE in May. By October 5, when the voter registration books closed for the election, 677 voters had registered as affiliated with it. Petitioner McLaughlin was nominated as the candidate for Governor. He polled 104,983 votes, over 4% of the total cast. Libertarian candidates in four state legislative districts polled over 10% of the votes cast for those seats.

Because its candidates for President and Governor polled less than 10% of the total vote, the Party is deemed to "cease to be a political party" for ballot access and voter registration, N.C.G.S. § 163–97, and, once the mandated order is issued by the BOE, the registration of voters affiliated with it will be changed to unaffiliated, N.C.G.S. § 163–97.1. To

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[13] Prior to the 1988 election, the Libertarian Party's candidate for President qualified to have write–in votes for him counted. As always, only the Democratic and Republican Party candidates exceeded the 10% vote threshold that year.

again gain ballot qualified status, the Party must file petitions containing signatures of 51,904 voters, 2% of the votes for Governor in 1992. The 104,903 votes cast for the Libertarian candidate for Governor in 1992, more than twice this number, do not protect it from being deemed to have "cease[d] to be a political party" for ballot access and voter registration purposes. The votes in excess of 10% of the total in four legislative districts do not permit the Libertarians to nominate party candidates even in those districts.

REASONS FOR ALLOWING THE WRIT

I. This Court Should Determine the Important Issue It Has Not Previously Considered of Whether, in a State Where Major Political Parties are Given Substantial Financial and Other Direct Benefits in Addition to Automatic Ballot Access Without Imposing Any Burden on Them Not Shared by Minor Political Parties, Election Laws Which Limit Major Party Status to Those Polling Ten Percent (10%) of the Vote for Their Candidate for Governor or President, Five Times the Degree of Support Required for Initial Ballot Access, Violates the First and Fourteenth Amendment Rights of Small Parties.

Challenges to of election laws affecting the First and Fourteenth Amendment rights of groups of voters are subject to the balancing test first established in Anderson v. Celebrezze, 460 U.S. 780, 789–790 (1983). This case concerns laws imposing severe burdens on ballot access by small parties. Such laws are subject to strict scrutiny, requiring the state show that the burdens imposed on the small party

are the least restrictive means necessary to serve a compelling interest. Burdick v. Takushi, 504 U.S. ___, 119 L.Ed.2d 245, 253 (1992); Norman v. Reed, 502 U.S. ___, 116 L.E.2d 711, 722–723 (1992); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 222 (1989).

This case raises the issue of the constitutional limits on the magnitude of ballot access retention laws giving major parties continuous, automatic access to general election ballots in a system which provides substantial benefits exclusively to the major parties while imposing equal or greater liabilities on minor parties. This Court has decided cases dealing with the existence of ballot access retention laws in systems where major party status imposes liabilities for major parties not shared by minor parties. It has not considered the constitutional limits on the magnitude of the burden for treatment as a major party or systems where major party status imposes substantial benefits and no offsetting liabilities. This case raises important issues of federal constitutional law not previously decided by this Court. The decision of the Fourth Circuit appears to be in conflict with this Court's decisions.

The goal of every group associated in a political party is to elect those representing its views to office. To do so, it must gain access to the ballot. To be effective, it must retain ballot access for succeeding elections. To allow participation by new parties, states must devise a scheme for them to gain

ballot access. The method used by North Carolina is ballot access petition. To prevent the major parties (who control the legislature) from having to petition every election cycle, North Carolina establishes an alternative method for ballot access retention, by polling a percentage of votes for one of two offices, Governor or President.

The number of votes cast for governor at the last election is used as the base for the amount of support required for both initial ballot access and retention. Access by petition requires the signatures of 2% of that number from the group of all registered voters. Retention requires the vote of 10% for a party's candidate for Governor or President, five times the number required for access by petition. Although a few minor parties have gained access by petition, the 10% vote requirement for retention is so high that only the Democratic and Republican Parties have ever reached it. Failure to meet the 10% vote required for retention results in cancellation of not only ballot access, but also the right to affiliate voters on registration rolls and the substantial benefits that the state gives to parties with affiliated voters, including public tax funds for the general election campaign and ballot position.

After polling over 100,000 votes for its candidate for Governor and more than 10% of the vote for candidates in four state legislative districts in 1992, the Libertarians challenged the constitutionality of the 10% vote retention

requirement as an undue burden and an invidious discrimination in favor the two major parties. Recognizing the substantial burden of the 10% ballot access retention provision, particularly in light of the absence of any separate method for party ballot access in local districts by showing support in that district, the Fourth Circuit concluded that it was required to uphold the constitutionality of the 10% retention requirement because of this Court's approval of "two-tier" systems in Jenness v. Fortson, 403 U.S. 431 (1971) and American Party of Texas v. White, 415 U.S. 767 (1974). Recognizing that subsequent opinions of this Court raised some doubt about the constitutionality of the "two-tier" system employed in North Carolina, the Fourth Circuit held "we fell bound to treat the result in White as controlling unless and until the Supreme Court provides a much clearer signal to the contrary."

Under the Georgia system in Jenness, a political organization's candidates could get on the ballot two ways, by winning a primary election conducted by a "party," one whose candidate for Governor or President polled at least 20% of the vote in the last election, or by being endorsed by a "body" and filing petitions signed by voters equal to 5% of those eligible to vote in the district for that office at the last election. Under the Texas system in White, a political party's candidates could get on the ballot three ways, by winning a

primary election conducted by a party whose candidate for Governor polled 200,000 votes in the last election, by being nominated by convention of a party whose candidate for Governor polled 2% of the votes in the last election, or by being nominated by convention of a party that filed petitions signed by voters (and counted heads at precinct conventions on primary day) equal to 1% of the votes for Governor in the last election. In both cases, this Court held the degree of support required for initial ballot access not unduly burdensome. In both cases, this Court rejected claims that the existence of a two-tier system denied equal protection, denying a complaint in Jenness to the provision of automatic ballot access for major parties and a complaint in White to the provision of state funds to major parties to defray the costs of conducting primary elections, by noting that major party status carried substantial burdens not shared by a minor party because major parties had to nominate by primary election and to provide the organizational structure, down to the precinct level, and the out-of-pocket expense of conducting primaries.

In neither case did this Court consider a challenge to the magnitude of the showing required to for ballot access retention. Starting with the equal protection issue, the system in North Carolina is fundamentally different. It provides substantial state funded benefits to major parties without imposing any burdens not shared equally by minor parties.

The North Carolina 10% ballot access retention provision creates two classes of political party during each four year election cycle. The major parties retain automatic ballot access and the right to maintain old and accumulate new voter affiliations on the registration rolls continuously. Minor parties like the Libertarians go through (1) a period of time after each gubernatorial election during which they must conduct a petition drive for "new" party ballot access, they are not ballot qualified, and they lose their right to maintain old and accumulate new voter affiliations, (2) followed by a period after requalifying as "new," during which they are ballot qualified and are permitted to start again accumulating voter registration affiliations from zero.

In North Carolina, a major party must nominate by primary election. A minor party must nominate by convention for the first election following certification as "new" and by primary election in any subsequent election in the four year cycle. Nomination by primary imposes no burden on a major party not shared by a minor party. The state, not the party, bears the full cost of, and obligation to provide the organizational structure required for, primary elections. The election laws impose no requirement for organizational structure on a major party in order to nominate by primary. A minor party must bear the financial and organizational cost of a petition drive. While it is doing so, the major party receives signifi-

cant state tax money from the Political Parties Financing Fund, based on its pro rata share of voter registration affiliations, for later use in the general election campaign. A minor party receives no tax money, because it is ineligible to maintain old or record new voter affiliations.[14] Throughout the four year cycle, a major and minor party bear equally the burden of the laws regulating and requiring reports of contributions and expenditures, laws which continue to treat a minor party as a recognized party after it has "ceased to exist" for ballot access and voter registration purposes.

Like initial ballot access requirements, requiring some percent of vote at a general election for retention does serve a state's legitimate interest in requiring all parties to make a periodic showing of a modicum of support sufficient to protect it from ballots cluttered with frivolous candidates and frivolous parties. Because the equal protection equation was fundamentally different, involving a mix of benefits and burdens to major parties with ballot access retention, Jenness and White do not address the issue of the constitutional limits on the magnitude of ballot access retention laws protecting the two major parties in state's like North Carolina. The analysis

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[14] The ballot access petition drive prior to the 1992 election cost the Libertarians $42,000. After expending those funds, the Libertarians had only $16,000 to spend on the general election campaign of their candidate for Governor.

of this Court in other ballot access cases suggests clearly that the state cannot justify the 10% vote requirement for retention as the least restrictive means for serving that interest.

First, requiring a showing of support at a level of 10% of the relevant electorate is beyond the support level that a state can presumptively justify as constitutionally necessary. See Storer v. Brown, 415 U.S. 724 (1974) (access by petition requires signatures of 5% of vote in last gubernatorial election, remanded for findings if too burdensome because restrictions on those eligible to sign effectively raised the percentage above 5%).[15]

Second, the state has determined that support by 2% of those voting in the last gubernatorial election on ballot access petitions is adequate to protect it from ballot clutter. Since the petition requirement was raised to that level in 1983, only three minor parties (Libertarians in 1984 and 1992, Socialist

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[15] Lower court's read Storer as setting 5% of the relevant electorate as the outer bound of magnitude of support a state can justify as presumptively constitutional. See Lendall v. Jernigan, 424 F. Supp. 951 (E.D. Ark. 1977), aff'd, 433 U.S. 901 (1977) (10% signatures for independent candidate petition unconstitutional); Greaves v. State Board of Elections, 508 F. Supp. 78, 82 (E.D.N.C. 1980) (10% of votes in last gubernatorial election for independent candidate petition unconstitutional); American Party v. Jernigan, 424 F. Supp. 943 (E.D. Ark. 1977) (7% of votes at last election for governor or president for party retention or new party petition unconstitutional).

Workers in 1984, and New Alliance in 1988) have been able to meet the 2% requirement. The Libertarian candidate for governor in 1992 polled more than 4% of the vote, twice that level of support.[16] In light of the history of its effectiveness to serve the state's interest, having chosen 2% of those voting for governor as the level of support necessary to prevent ballots cluttered with "new" parties, the state cannot claim that 10% of the vote is a necessary showing of support to serve it interest and that a 4% vote is not a sufficient showing of support for ballot access retention. See Norman v. Reed, supra; Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)

Because this case raises the important issue, not previously considered by this Court, of the constitutionality of the magnitude of ballot access retention requirements, in the context of an equal protection equation where the state's laws provide direct financial benefits to major parties with ballot access retention without imposing any burden not shared equally by minor parties, and because the analysis in this Court's other ballot access cases suggests that the 10%

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[16] Because ballot access petitions may be signed by any voter, including those affiliated with and voting for the candidates of another party, polling 2% at an election where a voter may vote for only one party's candidate is a much stronger showing of support for a minor party and its views than petition signatures.

retention requirement in this case cannot be justified as the least restrictive means for protecting the state's legitimate interests in a periodic showing of support to prevent ballot clutter, Petitioners' ask this Court to grant certiorari to decide their claim.

II. This Court Should Resolve the Conflict Between the Fourth and Tenth Circuits as to the Constitutionality of Election Laws Terminating the Right of A Minor Party to Retain and Record New Voter Affiliations on Registration Roles During Periods When the Party Has Temporariiy Lost Ballot Access Recognition.

When certified as ballot qualified in May 1992, the Libertarian Party also gained the right to have voters register as affiliated with it on registration rolls. When it failed to poll 10% of the vote for governor or president, in addition to losing ballot access, it "lost its legal status" as a party eligible to have new voters affiliate with it, N.C.G.S. § 163–97, and all of its existing voter affiliations must be changed to "unaffiliated," N.C.G.S. § 163–97.1. The two major parties retain existing voter affiliations and continue to be eligible to have more voters register as affiliated with them. Libertarians claim that these provisions burden them in two ways during periods of temporary loss of ballot access status, (1) by preventing them from the benefit of updated voter registration affiliation records maintained at state expense and provided without cost to the two major parties and (2) by denying them

the benefits that accrue from exploiting the build up of voter registration affiliations through inertia, as the major parties can, which give the major parties the derived benefits of tax funds for their general election campaign and position at the front of the ballot.

Applying the Anderson balancing test, the Fourth Circuit (1) rejected the Libertarians' first claim as no burden, reasoning it was sufficient to have old registration lists and to be able to purchase updated lists for a fee; (2) accepted the second Libertarians' claim as a real burden; (3) held the disaffiliation provisions served the state's interest in "administrative simplicity," reasoning that allowing every small party to have voters listed as affiliated with it would produce a sizeable list of parties with a potential for confusion of similar party names; and (4) held that, although the administrative burden that would be imposed on the state was not great, it was sufficient to outweigh the small burden on the Libertarians. The decision of the Fourth Circuit is in direct conflict with the decision of the Tenth Circuit in an identical fact situation, Baer v. Meyer, 728 F.2d 471, 475 (10th Cir. 1984).

In Baer, the Libertarian and the Citizens Party challenged laws which permitted only major parties, those who had polled 10% of the vote for governor in the last election, to register voters as affiliated with them. In conflict with the Fourth Circuit, the Tenth Circuit found the first claimed

burden, lack of access to updated and current information on voter choices to associate with a party, to be both real and significant, finding such information to be a "key to successful political organizing and campaigning" for all parties, including minor parties temporarily without ballot access status. Id. at 475. Old voter registration lists existing prior to the 1992 election do not show the new voters finding merit in the Libertarian message sufficient to cause them to desire to record or change their affiliation to Libertarian, leaving the Party "unable to determine from the welter of 'unaffiliateds" which of those unaffiliated voters are in fact supporters of their political organization." Id.

In conflict with the Fourth Circuit, the Tenth Circuit found the state's claim of a potential for many small parties with similar names clamoring for the right to voter affiliation to be a myth, because the right to voter affiliation could be limited to the few parties who had been previously recognized by placing candidates on the ballot. Id. 475--476. Only three parties have gained the right to ballot qualification in North Carolina since 1983 when the petition requirement was raised to 2% of those voting for governor in the past election. The challenge raised by the Libertarians which terminate their prior right to maintain old and record new voter affiliations would apply to very few parties. In addition, the statute for ballot access petitions expressly protected against similar

party names, requiring the BOE to "reject petitions for the formation of a new party if the name chosen contains any words contained in the name of an existing party." N.C.G.S. § 163–96(b).[17]

The Tenth Circuit held that the actual administrative burden on the state of being required to record voter affiliations of two small parties was nominal in a state where registration lists were computerized. Even without the additional burden on the Libertarians in North Carolina, where the right to maintain old and record new affiliations gives the major parties tax money for their general election campaign, the Tenth Circuit held the nominal administrative burden on the state insufficient to justify the burden of depriving a small party of current information from voter registration lists recording those choosing to affiliate with it. In conflict with the Fourth Circuit, the Tenth held the bar to registration of

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[17] The campaign contribution laws, which continue to govern the Libertarians after termination of their right to affiliate voters, contain a sufficient alternative measure of when a ballot access party has shrunk to insignificance. They require a party's treasurer to report to the BOE when the party is no longer active, when it has no political contributions for a year, or when it does not intend receive or expend more than $1,0000 annually. N.C.G.S. §§ 163–278.10 and 163–278.10A. This fully protects the State's interest in being able to determine when a party has become "frivolous" to the point where there is reason to terminate its ability to register affiliated voters.

affiliation with small, but previously recognized and still active, political parties to be unconstitutional.[18]

The decision of the Tenth Circuit in Baer is consistent with the requirement of Anderson to consider in every election law case, in addition to the weight of the State's interests, the "extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789–790. On this issue, this Court should grant certiorari to resolve the conflict between the Fourth and Tenth Circuits.

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[18] In a subsequent case from Oklahoma where registration lists were maintained by hand and not computerized, the Tenth Circuit found the administrative burden on the state to be greater and sufficient to justify the laws barring voter affiliation with parties who had lost their ballot access status by failing to poll 10% of the vote for governor or president. Rainbow Coalition of Oklahoma v. Oklahoma State Election Board, 844 F.2d 741 (10th Cir. 1988). The Tenth Circuit did not change the analysis followed in Baer. The balance was struck differently only because the state's administrative burden is greater when registration lists are maintained manually. Registration lists in North Carolina are computerized like those in Colorado at issue in Baer.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant their petition and issue its writ of certiorari to review the judgment of the Fourth Circuit affirming the judgment of the District Court.

This the 22d day of January, 1996,

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Supreme Court, U.S.
FILED

951196 JAN 22 1996

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SCOTT McLAUGHLIN, LIBERTARIAN PARTY OF NORTH CAROLINA, THE LIBERTARIAN PARTY, and KATHLEEN FERRELL,

Petitioners,

-v-

NORTH CAROLINA BOARD OF ELECTIONS and WILLIAM A. MARSH, Jr.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Scott McLaughlin, as a candidate for Governor of North Carolina and as a representative of the Libertarian Party of North Carolina; Libertarian Party of North Carolina; The Libertarian Party; Kathleen Ferrell, as a North Carolina Voter who desires to remain registered as a Libertarian,
Plaintiffs–Appellants,

v.

North Carolina Board of Elections; William A. Marsh, Jr., in his official capacity as Acting Director of the State Board of Elections,
Defendants–Appellees.

No. 94–1711

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
Richard C. Erwin, Senior District Judge.
(CA–93–100–2)

Argued: January 30, 1995

Decided: September 27, 1995

Before ERVIN, Chief Judge, MOTZ, Circuit Judge, and PHILLIPS, Senior Circuit Judge

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Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Chief Judge Ervin and Judge Motz joined.

Argued: James Richard Glover, GLOVER & PETERSEN, P.A., Chapel Hill, North Carolina, for Appellants. Charles McKinnon Hensey, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Ann B. Petersen, GLOVER & PETERSEN, P.A., Chapel Hill, North Carolina; E. Clark Dummit, DUMMIT & ASSOCIATES, Winston-Salem, North Carolina, for Appellants. Michael f. Easley, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

OPINION

PHILLIPS, Senior Circuit Judge:

The national Libertarian Party and the Libertarian Party of North Carolina, along with Scott McLaughlin, the state party's most recent candidate for Governor, and Kathleen Ferrell, a North Carolina voter registered as a Libertarian, appeal from a summary judgment order dismissing their claims seeking a declaration that three provisions of the North Carolina election laws unconstitutionally deprive them of

rights guaranteed by the First and Fourteenth Amendments and praying for an injunction against their enforcement. We affirm the district court's judgment on all counts.

I.

The relevant facts of this case are not in dispute and were presented thoroughly in the decision below. McLaughlin v. North Carolina Board of Elections, 850 F. Supp. 573 (M.D.N.C. 1994). We will only summarize them briefly.

The North Carolina election laws provide exactly three ways for a candidate to secure a spot on a general election ballot[1] for any federal, state, county, or municipal office: (1) by becoming the nominee of a major political party selected by primary election; (2) by becoming the nominee of a "new" political party selected by that party's state convention; and (3) by being nominated by petition as an unaffiliated candidate.[2]

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[1] The statute also provides for counting votes case for write-in candidates upon the filing a petition with 500 verified signatures (if the candidate is running for state-wide office) and payment of a verification fee of $.05 per signature. N.C. Gen. Stat. § 163-123 (1994).

[2] To qualify as an unaffiliated nominee for statewide office, the candidate must procure signatures from 2% of the state's registered voters. To qualify as an unaffiliated nominee for election to a county or district, the candidate must garner signatures from 4% of the registered voters in the relevant

To qualify as a "new" party for purposes of ballot access, a political party must file with the Board of Elections ("BOE") by June 1 in the same calendar year as the November general election petitions signed by registered voters numbering at least 2% of the total number of votes cast in the most recent general election for Governor,[3] with at least 200 signatures coming from registered voters residing in each of four congressional districts. The party must support the authenticity of each signature by notarized affidavit and also pay to the BOE a verification fee of $.05 per signature. If the BOE determines that the petitions contain the requisite number of valid signatures, it certifies the party as a "new"

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geographic area. In either event, the candidate must pay a $.05 verification fee to the state Board of Elections for each signature. N.C. Gen. Stat. § 163–122. Also, pursuant to the so–called "sore loser provision," a person whose name appeared on a primary election ballot of any party is ineligible to be listed as an unaffiliated candidate. Id. A candidate nominated through the individual process will be listed on the ballot in the column headed "Unaffiliated Candidates." N.C. Gen. Stat. § 163–140(b). There is no provision enabling such a candidate to identify her party affiliation, if she has one.

The provisions for qualification as an unaffiliated candidate are not directly at issue in this action.

[3] In North Carolina, the four–year gubernatorial election cycle coincides with the presidential election cycle.

party under N.C. Gen. Stat. § 163–96(a)(2) & –96(b) (1994), thereby entitling the party to nominate as much as one candidate per office to appear on the general election ballot. Voters are permitted to register affiliation with a party as soon as it becomes certified. If the new party obtains voter registration affiliation equal to or greater than 5% of the total statewide voter registration, its name is sorted alphabetically with the established parties for the purpose of column–assignment on the general election ballot. Otherwise, it is assigned to a column to the right of columns assigned to the candidates of the established parties. N.G. Gen. Stat. § 163–140.1. That is, for example, were 5% of all registered voters affiliated with the Libertarian Party, its candidates would appear on the ballot between the Democratic and Republican candidates. Were the Libertarians to become certified as a "new" party yet fail to attract 5% of the registered voters, then its candidates would be listed third after those nominated by the two major parties.

If a party's nominee for governor or for president polls at least 10% of the votes cast in the previous general election for governor or president, respectively, then that party retains its right to nominate candidates for all state and federal offices in the next general election. We will term such a

political organization an "established" political party.[4] Established political parties must nominate their candidates by primary election (unless only one candidate declares for that party's nomination for a particular office). § 163–110. If a party fails to poll for its candidate the requisite 10% of votes cast, "it shall cease to be a political party within the meaning of the primary and general election laws." § 163–97. When a party loses its ballot–qualified status, it also loses the affiliation of its registered voters. Section 163–97.1 provides that when a party "has lost its legal status as provided in G.S. § 163–97," the BOE must direct all county boards of elections to change the registration of "[a]ll voters affiliated with such expired political party to . . . "unaffiliated."' In order to regain the right to nominate candidates (as well as the right to affiliate voters), it must again become certified as a "new" party by submitting petitions signed by registered voters numbering at least 2% of the total number of votes cast in the prior general gubernatorial election.

The Libertarian Party of North Carolina was formed in 1976. It qualified for the general elections of that year by

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[4] the election laws term such a party as a "political party" simpliciter and distinguish parties that secure ballot access via petition by labelling the latter "new" political parties. § 163–96.

filing the requisite number of signatures.[5] Two other minor parties qualified as well. Because only the candidates of the Democratic and Republican Parties, Jimmy Carter and then-President Gerald Ford, exceeded the 10% threshold of 167,790 votes, the three minor parties were deemed to have expired by operation of N.C. Gen. Stat. § 163-97. The Libertarian Party qualified anew prior to both the 1980 and 1984 elections but each time failed to poll as many as 10% of the votes (garnering 9677 votes for its 1980 presidential candidate and 4611 for its 1984 gubernatorial candidate). In 1988, the Libertarian Party failed to qualify as a new party. However, its candidate for President did qualify as a write-in candidate. See supra note 1. He received 1263 votes out of the 2,134,370 votes cast for President. The Libertarian Party rebounded from its unsuccessful 1988 petition drive to obtain 43,620 valid signatures in its 1992 campaign — twenty more than the 2% required.

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[5] At that time, North Carolina required a party to obtain 10,000 signatures in order to qualify as a new party. See N.C. Gen. Stat. § 163-96 (1976). The law was amended in 1981 to require 5000 signatures and added the proviso that at least 200 signatures must be obtained from each of four congressional districts. 1981 N.C. Sess. Laws ch. 219. The law was amended to its present form in 1983. 1983 N.C. Sess. Laws ch. 576, § 3.

The Libertarian Party achieved unprecedented success in the 1992 general elections even though none of its candidates was elected. Three of its candidates for the state legislature received over 12% of the vote in their respective races. And the Party's candidate for Governor, plaintiff McLaughlin, polled 104,943 votes — over 4% of the total votes cast — in the gubernatorial election. However, because both McLaughlin and the Party's presidential candidate failed to reach 10% of the total vote, the Party is deemed to "cease to be a political party" for ballot access purposes, and, once the BOE so directs, the county boards of elections will change the affiliation of all 677 voters currently registered with the Party to "unaffiliated."

In February 1993, the National and State Libertarian Parties, Scott McLaughlin, and Kathleen Ferrell (collectively, "plaintiffs" or "Libertarians") filed suit in the United States District Court for the Middle District of North Carolina challenging as unconstitutional discrete provisions of the state's election laws and alleging general election improprieties not here relevant. The four specific provisions challenged were: (1) the forced voter disaffiliation provision of § 163–97.1; (2) the requirement of § 163–96(b) that a would–be new party pay a five–cent–per–signature verification fee; (3) the provision in § 163–97 that a party "ceases to exist" for

ballot access purposes unless it polls 10% of the vote in the gubernatorial or presidential elections; and (4) the mandate spelled out in § 163–96(b) that a petition for ballot access as a "new" party state that "THE SIGNERS OF THIS PETITION INTEND TO ORGANIZE A NEW POLITICAL PARTY." The suit named as defendants the North Carolina Board of Elections and its acting director, William A. Marsh, Jr.

The parties entered into stipulations of fact and filed cross motions for summary judgment. Thereafter, a magistrate judge issued proposed findings and an opinion recommending that those provisions of N.C. Gen. Stat. § 163–96(b) requiring notarization of the signatures on "new party" petitions and requiring the payment of 5 cents per signature be declared unconstitutional, and that the Libertarians' other claims for declaratory and injunctive relief be dismissed. Over the plaintiffs' objections, the district court issued an order adopting the findings and recommendations of the magistrate, and entered a final judgment granting plaintiffs declaratory and injunctive relief on their second claim and dismissing their other claims.

On appeal, the Libertarians reassert their constitutional challenges to: the provisions of the North Carolina election laws that regulate political parties' access to the ballot; the

mandated ballot-petition language; and the Voter Disaffiliation provision. The state has not cross appealed from that portion of the district court's decision below declaring § 163-97 [sic] unconstitutional.

II.

The appropriate standard governing constitutional challenges to specific provisions of state election laws begins with the balancing test that the Supreme Court first set forth in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). As the Court put it in its most recent ballot access decision, that test directs that

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 112 S.Ct. 2059, 2063 (1992) (citations omitted). Despite its explicit endorsement of the Anderson approach, the Burdick Court also reaffirmed a single modification, that election laws which place "severe" burdens upon constitutional rights are subject to strict scrutiny: "the regulation must be 'narrowly drawn to advance a state interest

of compelling importance.'" Id. (quoting Norman v. Reed, 112 S.Ct. 698, 705 (1992)). See also Eu v. San Francisco County Democratic Central Cmte., 489 U.S. 214, 222 (1989); Illinois Election Bd. v. Socialist Workers Party, 440 U.S. 173, 184–85 (1979) (severe restriction must be "least drastic means" to serve compelling interest).[6]

In short, election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so,

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[6] As an apparent corollary to the rule that election regulations that impose serve burdens on protected interests are subject to strict scrutiny, some courts have discerned or suggested that election laws that impose less substantial burdens need pass only rational basis review. See e.g., Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992); McLain v. Meier, 637 F.2d 1159, 1167 & 1168 n.16 (8th Cir. 1980). We do not read the Supreme Court's opinions that way. We believe that a regulation which imposes only moderate burdens could well fail the Anderson balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational. See e.g., Burdick, 112 S.Ct. at 2066–67 (determining, first, that challenged election provision imposed "slight" burden and then applying balancing test to conclude that the "legitimate interests asserted by the State are sufficient to outweigh the limited burden"). On the other hand, if a regulation imposes no burdens, it would not fail the balancing test even though it also served no discernable state interest. See infra Section II.B

strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that "order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974). "The results of this evaluation will not be automatic; . . . there is 'no substitute for the hard judgments that must be made.'" Anderson, 460 U.S. at 789–90 (quoting Storer, 415 U.S. at 730).

Within this framework, we will consider each of the Libertarians' three challenges in turn. We subject the district court's determinations whether any particular provision or set of provisions passes constitutional muster to de novo review. Fulani v. Krivanek, 973 F.2d 1539, 1541 (11th Cir. 1992).

A.

We consider first the state law provisions restricting political party access to the ballot.

As a rule, state laws that restrict a political party's access to the ballot always implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments. That is because "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amend–

ment which embraces freedom of speech," Anderson, 460 U.S. at 787 (internal quotation omitted), and because "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." William v. Rhodes, 393 U.S. 23, 31 (1968); see also Norman v. Reed, supra, 112 S.Ct. at 705; Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214 (1986). Moreover, the burden that North Carolina ballot access restrictions impose on protected interests is undoubtedly severe — that is, as history reveals, those regulations make it extremely difficult for any "third party" to participate in electoral politics.[7] It remains only to determine, then, whether the North Carolina rules that govern a party's ability to place candidates on the general election ballot are the least restrictive means to achieve the

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[7] On this point, we disagree with the district court which, in finding that the ballot access regulations did not impose a severe burden on protected interests (and therefore did not warrant strict scrutiny), might have thought that such regulations do not impose a "severe" burden unless they are exclusionary. See, 850 F. Supp. at 382. To the contrary, as we previously have observed, strict scrutiny can apply to laws which "mak[e] it difficult, but not impossible, for a new political party to obtain a position on the ballot." Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993) (citing Norman); see generally id. at 1349–52.

"important state interest in requiring some preliminary modicum of support before printing the name of a political organization's candidate on the ballot — the interest, if no other, of avoiding confusion, deception, and even frustration of the democratic process at the general election." Jenness v. Fortson, 403 U.S. 431, 442 (1971).

This inquiry brings us into hazardous terrain. While all states condition ballot access on a showing of some "preliminary modicum of support," it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests. However, the plaintiffs do not ask us to do so. Instead, they urge that the North Carolina election laws themselves expose that the state's ballot access regulations are not the "most narrowly tailored means," Norman, 112 S.Ct. at 708, to advance the state's compelling interests. Because North Carolina believes that the support of 2% of those who voted in the previous gubernatorial election is sufficient to get a party on the ballot in the first place, the Libertarians explain, the state cannot also believe that the party's failure to attract 10% of the votes in the subsequent election ipso facto demonstrates that the party lacks the necessary modicum of support that justifies its place on the

ballot. In advancing this argument, the Libertarians rely in large measure on the Supreme Court's reasoning in Norman v. Reed and Illinois Election Bd. v. Socialist Workers Party. In both cases the Court held that the state could not require a party that wishes to place a candidate for election in a political subdivision to obtain more petition signatures than required to accord the party ballot access for a statewide race. The Court reasoned that the lesser number conclusively established that the state itself does not consider the greater number the least restrictive means to demonstrate that the party has a significant modicum of support.

Unfortunately for the Libertarians, the surface plausibility of their analogy is belied by clear Supreme Court precedent. In Jenness v. Fortson, the Court upheld against constitutional challenge Georgia election laws that distinguished between "political parties" and "political bodies" in ways similar to the different treatment that North Carolina accords established and "new" political parties. In particular, Georgia termed any political organization whose candidate received at least 20% of the vote in the most recent presidential or gubernatorial election a "political party" and provided that it must nominate candidates to be placed on the general election ballot by primary election. Any other political organization was termed a "political body." A nominee of a

political party could get his name printed on the general election ballot only by filing a nominating petition signed by at least 5% of the total number of electors eligible to vote in the last election for the office he sought. Jenness, 403 U.S. at 433. Similarly, in American Party of Texas v. White, 415 U.S. 767 (1974), the Court upheld a complicated Texas ballot access scheme that, in much-simplified essence, permitted political parties to gain initial access to the ballot by securing the signatures of persons numbering 1% of the total votes cast in the prior gubernatorial election, but required such parties to poll at least 2% of the votes cast in the gubernatorial election to retain their ballot access.

Concluding that Jenness squarely controlled, the district court held below that "the two-tier system is a reasonable and legitimate one for [North Carolina] to impose." 850 F. Supp. at 385. The court properly reasoned that

> [t]he fact that North Carolina has chosen to make ballot access easier does not logically require it to make ballot retention easier as well. The purpose of the two vehicles for showing support among the electorate has two entirely different purposes. While both ensure that the election ballots are not cluttered by numerous small groups, the lower ballot access requirement actually gives a group a chance to prove itself when it otherwise would be kept off the ballot. It is an

> inclusive, not an exclusive policy — a safety valve promoting political participancy while protecting the ballot. . . . It is not unfair to expect a party to improve its showing of support from the petition process to be accorded automatic ballot access . . . .

Id. at 384–85. Indeed, we previously have upheld two–tier ballot access schemes that require a party to exhibit a greater showing of support to remain on the ballot than that party needed to place a candidate in the first place and that are roughly comparable in magnitude to the tiers that North Carolina has established. See Libertarian Party of Virginia v. Davis, 766 F.2d 865 (4th Cir. 1985) (.5% access requirement for statewide office, 10% retention); Socialist Workers Party v. Hechler, 696 F. Supp. 190 (S.D. W.Va. 1998), aff'd in part, 890 F.2d 1303 (4th Cir, 1989), cert. denied, 495 U.S. 932 (1990) (1% access, 10% retention). Other Circuits have upheld two–tier schemes that are more onerous. See e.g., Aruntunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982) (5% access, 10% retention); Patriot Party of Pennsylvania v. Mitchell, 826 F. Supp. 926, 937 (E.D. Pa.), aff'd, 9 F.3d 1540 (3d Cir. 1993) (2% access, 15% retention); see also Libertarian Party of Maine v. Diamond, 992 F.2d 365 (1st Cir. 1993).

We cannot dispose of this issue, however, simply by

noting that schemes with similar tiers have been uniformly upheld. The Supreme Court has emphasized that ballot access restrictions must be assessed as a complex whole. Because it is rare indeed that a rule which requires a party to demonstrate a particular percentage of support in order to secure or retain ballot access would be unconstitutional per se,[8] a reviewing court must determine whether "the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights." Williams v. Rhodes, supra, 393 U.S. at 34. Thus, in Jenness itself, the Court upheld Georgia's two-tier system only after demonstrating that other aspects of the election laws serve to ensure reasonably open access to the ballot. The Court stressed, for example, that the law imposed no obstacle to counting write-in votes and "no suffocating restrictions whatever on the free circulation of nominating petitions." 403 U.S. at 438. And in Burdick, the Court upheld Hawaii's ban on write-in voting in light of the ease with which unaffiliated and small party candidates could get their names placed on the

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[8] Such a rare instance might arise, for example, were a provision to terminate a party's ballot access upon it failure to poll at least 35% of the vote. In that case, the election laws would effectively ensure that no more than two parties could ever become "established."

ballots in the state's "open primary." The Court concluded that "Hawaii's prohibition on write–in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth [sic] rights of the State's voters." 112 S.Ct. at 2067–68. See also Storer v. Brown, supra, 415 U.S. at 737 (noting that "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights").

When the ballot access provision here at issue is assessed in light of the totality of the North Carolina election laws, a serious problem is raised that has to be addressed. In one potentially significant respect, the North Carolina ballot access regime is distinguishable from, and more restrictive than, the Georgia system that the Supreme Court upheld in Jenness, and the West Virginia and Virginia schemes that we approved in Hechler and Davis, respectively. Specifically, North Carolina provides no means by which a small party can nominate a candidate for any office in the state unless is secures the petition support of 2% of the persons who voted in the previous gubernatorial election. That means, for instance, that the Libertarian Party cannot nominate candidates even in the four legislative districts where Libertarian candi–dates polled more than 10% of the total vote cast at the 1992

election without first meeting the requirements to qualify as a statewide party. Even had a Libertarian candidate for local or county-wide office won her election, her ability to designate her party affiliation on the ballot for purposes of reelection would be conditioned on the party's ability to register support elsewhere. (She could, of course, run for reelection as an independent candidate. But she would then be obligated to identify herself as "unaffiliated" on her ballot access petition, N.C. Gen. Stat. § 163-22(b), and, if her petition succeeded, would appear on the general election in the column headed "Unaffiliated Candidates." § 163-140.) More generally, no party other than the Democrats and the Republicans can run a candidate in any election in the state in 1996 unless it submits a petition with 51,904 voters across the state (including at least 200 in each of four congressional districts) — even if that far exceeds the number of persons registered to vote for that office.

Under the Georgia law upheld in Jenness, in contrast, a nominee of any political body, or an unaffiliated candidate, could get his name placed on the general election ballot by filing a petition "signed by a number of electors not less than five per cent of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking." Jenness, 403 U.S. at 433 (internal quotation

omitted). Significantly, Georgia law provided for the identification of a candidates minor-party (i.e. "political body") affiliation, if any, on both the nominating petition, Ga. Code Ann. § 34-1010(d) (1970 rev.), and the general election ballot. § 34-1103(c). Likewise, under the West Virginia law at issue in Hechler, a petitioner seeking any office was permitted to designate her minor-party affiliation on the nominating petition and, if she obtained a spot on the general election ballot by submitting the signatures of voters numbering 1% of the votes cast at the previous election for the office sought, see Hechler, 890 F.2d at 1307, she could designate her party affiliation on the official ballot as well. W. Va. Code § 3-5-23(d) (1989). And, the Virginia ballot access laws at issue in Davis imposed only modest petitioning requirements for independent candidates and candidates affiliated with unrecognized parties in races for less-than-statewide offices. See Va. Code Ann. § 24.1-168 (1985) (recodified, as amended, at § 24.2-506). Although Virginia prohibited the name of any political party -- major or minor -- to be listed on the general election ballot, Va. Code Ann. § 24.1-111 (1985) (recodified, as amended, at § 24.2-613), the statute was silent as to whether the party affiliation could appear on the nominating petitions.

As indicated, this is a serious distinction that could

arguably make a constitutional difference. Noting that it had long recognized "the constitutional right of citizens to create and develop new parties," the Supreme Court cautioned in Norman that it may be impermissible for a state to "foreclose the development of any political party lacking the resources to run a statewide campaign." Norman, 112 S. Ct. at 705–06. Arguably, that is the combined effect of the North Carolina ballot access restrictions we have identified.[9] By directing that a political party cannot run a candidate for election to any office in the state unless it garners the petition support of 2% of the electorate or the votes of 10%, sections 163–96 and 163–97 have combined so far to ensure that the Libertarian Party (and potentially any other small party) has been forced to expend great effort to obtain statewide and local ballot access before each gubernatorial and presidential election only to lose that access in toto immediately thereaf–

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[9] It should be noted, however, that another related restriction on small party access recently has been voided. N.C. Gen. Stat. § 163–98, which provides that "new" parties can "have the names of its candidates for State, congressional, and national offices printed on the official ballots, but shall not be entitled to have the names of candidates for other offices printed on State, district, or county ballots at that election" was declared unconstitutional in New Alliance Party v. North Carolina State Bd. of Elections, 697 F. Supp. 904 (E.D.N.C. 1988).

ter.

The fact that unaffiliated candidates can be placed on the ballot for local, district and county offices by submitting a petition with signatures from 4% of the registered voters in that area, see supra note 2, does not necessarily relieve the problem. The Supreme Court has recognized that the "political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer, 415 U.S. at 745. Cf. Eu, 489 U.S. at 224–25 ("imposing limitations 'on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association") quoting Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, 454 U.S. 290, 296 (1981)). By permitting independent candidates for local office to gain ballot access by showing a substantial modicum of support among voters in the relevant community while withholding that option from affiliated candidates of small parties, the state inevitably burdens the associational rights of members of those small parties as well as the informational interests of all voters regardless of their party affiliation. See Tashjian, 479 U.S. at 220 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of

public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise."). As the Eighth Circuit noted when striking down a North Dakota ballot access regime which provided a shorter filing period for affiliated candidates than for independents, "[a] candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process." McLain, supra, 637 F.2d at 1165; see also Libertarian Party of South Dakota v. Kundert, 579 F. Supp. 735, 739 (D. S.D. 1984).

The problem's seriousness conceded, we nevertheless believe that the provisions at issue pass constitutional muster under the Supreme Court's decision in American Party of Texas v. White, 415 U.S. 767 (1974). There, the Court upheld a two-tier system that did not provide a separate avenue for small parties to run candidates for local elections.[10] In the Texas scheme, as in the North Carolina one

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[10] Although the plaintiffs in White did not directly challenge Texas's failure to provide a less onerous means for affiliated candidates of small parties to run for local office, the absence of any such alternative was clear from the record and the Court expressly held that the state's ballot access limitations, "whether considered alone or in combination, are constitutionally valid." 415 U.S. at 781. Accordingly, we

here at issue, an independent candidate for local office could place her name on the ballot by securing signatures from voters representing a fixed percentage of the votes cast in the district, see id. at 775 n.7; a party, in contrast, could not nominate candidates for local office without demonstrating statewide support.[11] Other Courts of Appeals have similarly upheld two-tier systems that do not provide a mechanism for a party to achieve ballot access for local or county elections

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have previously recognized that the White Court held the Texas ballot access scheme, "taken as a whole, to be within the bounds of the Constitution. Hechler, 890 F.2d at 1306 (emphasis added).

[11] That the access and retention percentages under Texas law were 1% and 2% respectively (rather than 2% and 10%) does not suffice to make White distinguishable from this case. First of all, what makes the North Carolina ballot access laws potentially suspect under our analysis is that they use state-wide, rather than more localized, voting figures as the benchmark for determining whether a party has a sufficient modicum of voter support. In that regard, the Texas and North Carolina [sic] are indistinguishable. Moreover, it is certainly possible that, given all its peculiarities, the Texas scheme may have made it more difficult than does the North Carolina scheme for small parties to gain ballot access. For example, a Texan voter was ineligible to sign a nominating petition if he had already signed another nominating petition for another party or had voted in a party primary. See 415 U.S. at 774 n.6.

without having to demonstrate significant statewide support. See Libertarian Party of Florida v. State of Florida, 710 F.2d 790, 795 (11th Cir. 1983) (dismissing a constitutional challenge to election laws which provided, inter alia, that "a minor political party may not run a candidate in a local election without first obtaining access to the state's general election ballot through the 3% statewide petitioning requirement"); Aruntunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982).

Although subsequent Supreme Court opinions might be read to cast doubt upon the constitutionality of the election scheme upheld in White, see e.g., Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1987) (observing in dicta that "States may condition access to the general election ballot by minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office") (emphasis added — and thereby to discredit Libertarian Party of Florida and Arutunoff — we feel bound to treat the result in White as controlling unless and until the Supreme Court provides a much clearer signal to the contrary. For that reason, we reject the Libertarians' challenge to the North Carolina election laws restricting political party access to the ballot. Although the challenge is a serious one, we agree with the district court that the ballot access rules do not unconsti-

tutionally burden rights guaranteed by the First and Fourteenth Amendments.

B.

We next consider the challenge to the mandated ballot–petition language.

Properly understood, a state law that regulates the specific form and content of ballot access petitions is itself a ballot access regulation. The extent to which any prescribed language encourages or deters persons from signing the petition makes it correspondingly easier or harder for the petitioning party to garner the requisite number of signatures to gain ballot access. North Carolina mandates that:

> Petitions for the creation of a new political party shall contain on the heading of each page of the petition in bold print or all capital letters the words: "THE UNDERSIGNED REGISTERED VOTERS . . . HEREBY PETITION FOR THE FORMATION OF A NEW POLITICAL PARTY TO BE NAMED _____ . . . . THE SIGNERS OF THIS PETITION INTEND TO ORGANIZE A NEW POLITICAL PARTY TO PARTICIPATE IN THE NEXT SUCCEEDING GENERAL ELECTION.."

N.C. Gen. Stat. § 163–96(b). The Libertarians object to the mandated petition language on two grounds. They argue that it conveys the erroneous impressions, first, that the Libertarian

Party is "new" in the colloquial sense and, second, that each petitioner will have to assume an active role in the forming of the Party beyond merely signing the petition. For the purposes of the Anderson balancing test, the plaintiffs' contention is that the challenged language impedes the Party's ability to get on the ballot without advancing any legitimate state interests.

The district court acknowledged that the challenged language "could possibly cause some minor confusion in that voters may think that the party seeking ballot access has no previous existence and/or that they are personally required to do some organizing." 850 F. Supp. at 393. It apparently also recognized that the state had no legitimate interest in inducing either belief among potential signatories. The court nonetheless rejected plaintiffs' constitutional challenge on the grounds that they had failed to prove that the language did in fact cause confusion which harmed the Party's petition drive in the least. The court emphasized that its holding "would not foreclose a challenge to the petition language in the future upon presentation of sufficient evidentiary support." Id.

Initially, we agree with the district court that the state can have no legitimate interest in requiring signers to commit to being party organizers. As the Supreme Court has expressly recognized, "[a] major state political party necessarily

includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members . . . limit their participation to casting their votes for some or all of the Party's candidates." Tashjian, 479 U.S. at 215. BOE's contention that the language in question serves "legitimate and compelling state interests" by "assur[ing] election officials that it will not be a waste of money to print a new party's candidates' names on the ballot," BOE Brief, at 15, is without merit. While the final sentence of the mandated language can no doubt help election officials gauge the intensity of the party's support insofar as it may prevent less committed supporters of a new party from signing the ballot access petition, the state has no legitimate interest in limiting ballot access to parties which show a substantial modicum of enthusiastic support. Because every vote counts the same, whether cast enthusiastically or even grudgingly, cf., Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 (4th Cir. 1989) (discussing the considerable significance of "protest votes" in the democratic process), the relevant question for purposes of ballot access can only be whether members of the public want to have the opportunity to vote for a candidate of a particular party. See Libertarian Party of Nevada v. Swackhamer, 638 F. Supp. 565, 569 (D. Nev. 1986); Kundert, supra, 579 F. Supp. 739 (citing with approval

mandated petition language in Minnesota, Montana, Colorado, North Dakota, Florida, and Texas). The number of persons who are sufficiently committed to the party to help organize it is simply not pertinent.

Although the particular language that North Carolina proscribes on ballot access petitions does not advance any important state interests, if fails the Anderson balancing test only if it also does in fact burden protected rights. In the absence of any evidence that the challenged language has made it more difficult for the Libertarians to secure petition signatures than their task would have been had their petitions omitted the objectionable references, the dispositive question is whether, as the Libertarians urge, we should simply assume that the challenged language does hamper small parties' efforts to attract voters to sign their petitions. We are certain that a court should indulge such an assumption in appropriate cases. Thus, in Hechler, we invalidated a West Virginia ballot access provision which required that nominating certificates declare that each signator "desires to vote" for the named candidate because we concluded that "there can be only one interpretation of this language in the mind of the subscriber," that he intends to vote for the candidate in the general election. 890 F.2d at 1308. Emphasizing that what was important was how voters would interpret the petition language, not what the

legislature intended, id. at 1310, we held the statutory requirement unconstitutional at least in part because it was clear to us that such an interpretation would "discourage people from joining unpopular or controversial parties or causes." Id. at 1309. See also Anderson v. Mills, 664 F.2d 600, 608–10 (6th Cir. 1981). We cannot say of the challenged language in this case, however, that it permits of "only one interpretation." While we agree that the language "could possibly" be interpreted the way the Libertarians claim, we are equally certain that it need not be so interpreted. A reasonable voter could well construe the language as a whole to mean only that the signers intend jointly — and not necessarily severally — to organized a political party that is "new" in the narrowly relevant sense of not being presently qualified "to participate in the next succeeding general election." So understood, the language is not likely to deter a person otherwise interested in supporting the petitioning party from contributing her signature.

At bottom, we believe that we may not declare a state's mandatory ballot petition language unconstitutional merely because it could conceivably mislead some individuals and could have been crafted more adroitly. Rather, either the factfinder must be persuaded that protected expressive, political, and associational rights have in fact been invaded,

or the court must be able to conclude as a matter of law that such is the inevitable consequence. Because neither condition is here satisfied, the district court properly refused to declare N.C. Gen. Stat. § 163–93(b) unconstitutional on the stipulated record before it.[12]

C.

We consider finally, the challenge to N.C. Gen. Stat. § 163–97.1, which mandates disaffiliation of a party's registered voters when the party "ceases to exist" by operation of § 163–97. Although the Libertarians claim that this forced disaffiliation requirement burdens their protected rights in a myriad of ways, we believe that the arguable burdens reduce to two. The first is that claimed to result from the forced changing of the registration of all their members to "unaffiliated" status; this, it is argued, prevents the party from benefitting from the state's extensive efforts to update and

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[12] We reiterate that the Libertarians did not proffer any evidence that the challenged aspects of the mandated petition language actually hampered their petition drive in even the slightest degree. Consequently, we need not determine whether the district court's observation that the plaintiffs had "not presented sufficient facts . . . to show that numerous voters would have signed the petition had it not been for the allegedly offending language," 850 F. Supp. at 393 (emphasis added), impliedly overstated the proper extent of plaintiffs' evidentiary burden.

classify the voter registration lists. See N.C. Gen. Stat. §§ 163–65 to –74. The second is the burden claimed to be imposed upon those parties which, like the Libertarian, remain in existence after losing ballot access status and eventually regain official recognition by preventing them from exploiting the natural inertial force of registration as the established parties can. Instead, such parties are compelled to expend some portion of the limited resources they can devote to voter registration efforts simply to re–register former party members who had been forcibly disaffiliated. This is a real harm, the Libertarians claim, because real benefits accrue to a party in proportion to the number of its registered voters. Most notably, recognized parties are entitled to disbursement from the North Carolina Political Parties Financing Fund "on a pro rata basis according to their respective party voter registrations." N.C. Gen. Stat. § 105–159.1. Also, the more favorable ballot positions are reserved for those parties which have affiliated at least 5% of the total number of registered voters.

We believe that the plaintiffs' first argument is without merit, for the disaffiliated parties still have access to the state's registration lists (albeit for a fee) even after they lose official recognition. Therefore, the Libertarians are able to gain as much information from the updated lists as can the established parties so long as they take the simple expedient

of recording all voters who have registered "Libertarian" before those voters' affiliation is changed. We do agree, though, with the plaintiffs' second argument. While the burden is no doubt small, it is real and cognizable.

In opposition to this burden, BOE argues that § 163–97.1 "meets the legitimate state goals of fostering administrative simplicity (no need to maintain information about a party that no longer exists) and maintaining the integrity of the election process by having the registration records reflect the true state of affairs." BOE Brief, at 9. In order to perform the Anderson balancing test, we will consider the validity and gravity of each alleged state interest.

BOE's second contention — the "electoral integrity" argument — rests on a fallacious premise. "[T]he true state of affairs," as far as we can tell, must be that a party continues to exist so long as it retains enough of the features that ordinarily serve to constitute a voluntary association of persons; chiefly membership, a name, and a purpose. By these ordinary tokens of existence, and as far as the record reveals, the state Libertarian Party has existed continuously since its formation in 1976. In short, the Libertarian Party has not, as BOE's argument would suggest, risen like a Phoenix from its own ashes every four years. Accordingly, we cannot perceive how electoral integrity would be disserved

by permitting affiliates of a political party that strives mightily (and usually successfully) to place candidates on the general election ballot at regular intervals to retain their party registration during the interim periods when the party's purported nonexistence is entirely formal. We especially observe that "electoral 'integrity' does not operate as an all-purpose justification flexible to fit any challenge and strong enough to support any restriction." Republican Party of Arkansas v. Faulkner County, Arkansas, 49 F.3d 1289, 1299 (8th Cir. 1995).

In contrast to its "electoral integrity" argument, BOE's first contention — the administrative simplicity argument — does have some force. True, the conclusory parenthetical "(no need to maintain information about a party that no longer exists)" is as weak as is BOE's contentions regarding the "true state of affairs." Nonetheless, we believe that the district court was right to observe

> that if all political parties, no matter how small, had a right to have voters list themselves as being affiliated with them, the list could become sizeable; thereby posing possible administrative burdens and also causing confusion for registrars, such as trying to keep track of parties whose names are similar.

850 F. Supp. at 386.[13] The district court noted the administrative burden is not great but, given the very limited burden

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[13] The district court also adverted to a third interest not advanced by the defendants, noting that, absent forced disaffiliation,

> [t]he voters could suffer prejudice as well. Being affiliated with a major party or being unaffiliated allows voters the possibility of voting in the primary elections. N.C. Gen. Stat. § 163–59. If numerous small groups were given affiliation rights, this would shut out those voters from the primary process, thereby possibly increasing the feeling of alienation and disenfranchisement. The dangers of factionalism, confusion, and overreaching would be significantly increased.

850 F. Supp. at 386–87.

There is no doubt, of course, that the state has a legitimate and important interest in combatting feelings of alienation among the electorate. Unlike the district court, however, we cannot discern how the challenged provision advances that interest. Indeed, we consider it nothing short of fantastic to suppose that people who have taken the affirmative steps to register with a particular party must be forcibly disaffiliated because the alternative — maintaining the status quo until the voter him or herself chooses to change his or her affiliation — would breed a sense of disenfranchisement. The 677 adults who, like Kathleen Ferrell, registered as Libertarians are not likely to feel disenfranchised because they are unable to vote in the primaries of the established parties.

that the disaffiliation provision imposes, it need not be.

We agree. We therefore conclude that the state's interests in administrative simplicity that are advanced by the forced voter disaffiliation provision, N.C. Gen. Stat. § 163–97.1 outweigh the small burden that provision imposes on affected parties' associational interests.

III.

For the foregoing reasons, we hold that the challenged provisions of the North Carolina election laws do not violate the appellants' rights under the First and Fourteenth Amendments. The district court judgment is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 24, 1995

No. 94-1711
CA-93-100-2

SCOTT McLAUGHLIN, as a candidate for Governor of North Carolina and as a representative of the Libertarian Party of North Carolina; LIBERTARIAN PARTY OF NORTH CAROLINA; THE LIBERTARIAN PARTY; KATHLEEN FERRELL, as a North Carolina Voter who desires to remain registered as a Libertarian,

Plaintiffs-Appellants,

v.

NORTH CAROLINA BOARD OF ELECTIONS; WILLIAM A. MARSH, JR., in his official capacity as Acting Director of the State Board of Elections,

Defendants-Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

Filed Feb 25, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

SCOTT McLAUGHLIN, et. al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	2:93CV00100
	)	
NORTH CAROLINA BOARD OF ELECTIONS, et. al	)	
	)	
	)	
Defendants.	)	

FINDINGS OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the parties' cross--motions for summary judgment. The Court heard oral argument on February 3, 1994. Previously, the parties submitted stipulated facts (pleading 9) along with exhibits. At the oral argument, both sides agreed that the Court could consider all forty-four exhibits in support of the stipulated facts, including unsigned affidavits which were to be treated as if they were signed by the affiants. In addition, both parties stated that should the matter be submitted for trial, they would have no further evidence to submit in support of their claims or defenses. Considering the nature of these stipula-

tions, the Court finds the matter is appropriate for decision on the present record.

Plaintiffs are the Libertarian Party of North Carolina, the Libertarian Party (national party), a former Libertarian candidate for governor and representative of the Libertarian Party and a registered Libertarian voter. The defendants are the North Carolina Board of Elections and its director.

The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201. Plaintiffs seek declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 and the above statutes, against N.C. Gen. Stat. §§ 163–96(b), 163–97 and 163–97.1, claiming that both on their face and as applied, the statutes violate the First and Fourteenth Amendments of the United States Constitution. The plaintiff Libertarian voter claims that her First and Fourteenth Amendment rights are violated because the state arbitrarily denies her the right to register as a Libertarian. Finally, plaintiffs claim that as a result of the totality of the operation of the challenged statutes and certain election improprieties occurring during the 1992 general election, plaintiffs are entitled to injunctive relief.

I.

Summary of Stipulated Facts and Evidence

Parties

1. The Libertarian Party is a national political party which has a nationally published political platform, regularly holds state and national conventions, has supported the successful candidacies of elected officials and has been certified as a "political party" in North Carolina.

2. Plaintiff Scott McLaughlin resides in Guilford County, North Carolina; was the Libertarian Party's candidate for governor in the general election held on November 3, 1992; is a member at large of the Executive Committee of the Libertarian Party of North Carolina and brings this action in both capacities and on behalf of the Libertarian Party.

3. Plaintiff Kathleen Ferrell is a citizen, resident and registered voter of Guilford County, North Carolina. She registered to be a member of the Libertarian Party after the 1992 general election and desires to remain registered as a Libertarian with the Guilford County Board of Elections.

4. The North Carolina Board of Elections (hereinafter "Board") is an agency of the State of North Carolina empowered to act for the State of North Carolina by N.C. Gen. Stat. §§ 163-19 -22. Defendant Board is responsible for the overall supervision of the county boards of elections in regard

to maintenance of records of registered voters in North Carolina.

1976 and 1980 Elections

5. The Libertarian Party of North Carolina was formed in 1976 and has participated in most general elections since its formation. At that time, N.C. Gen. Stat. § 163–96 required a new political party to obtain 10,000 signatures on a petition in order to be recognized and gain access to the ballot.

6. The Libertarian Party participated in the 1976 election for president, along with two other minor parties, the American Party and the Labor Party, and with the two dominant or major parties, the Democratic and Republican Parties. The total vote for president in North Carolina was 1,677,906. The Libertarian candidate received 2,219 votes, the Labor Party 755 votes, and the American Party 5,607 votes.

7. The Libertarian Party participated in the 1980 presidential election. The total presidential vote was 1,855,896. The minor parties were the Libertarian Party, the Citizens Party, and the Socialist Workers Party which received 9,677 votes, 2,287 votes and 416 votes respectively. In addition, independent candidate John B. Anderson received 52,800 votes.

1984 and 1986 Elections

8. Prior to the 1984 election, N.C. Gen. Stat. § 163–96(a)(2) was amended to increase the number of signatures required on a petition to two percent (2%) of the number of persons who voted in the most recent general election for governor in order for a new political party to be recognized and gain access to the ballot. If the party does not obtain ten percent (10%) of the vote for governor or president, it loses recognition. N.C. Gen. Stat. §§ 163–96 and –97.

10. The Republican and Democratic Parties are the only two parties who have remained Certified Political Parties under N.C. Gen. Stat. §§ 163–96 and –97 since their enactment.

11. In the 1984 election the Libertarian and Socialist Workers Parties fulfilled the two percent (2%) petition requirement and appeared on the ballot. The voter for the presidential electors was 2,175,361 and the total vote cast for governor was 2,226,727. The Libertarian candidate for president obtained 3,794 votes and their candidate for governor received 4,611 votes. This amount fell far short of the ten percent (10%) of either the gubernatorial or presidential elector votes needed to remain qualified as a political party under North Carolina law and N.C. Gen. Stat. § 163–97.1 was implemented.

11. In the 1988 general election, the Libertarian Party did not qualify as a political party under the two percent (2%) petition requirement of N.C. Gen. Stat. § 163–96(a)(2). The New Alliance Party did. The Libertarian Party, however, did qualify to have write–in votes cast on its behalf counted pursuant to N.C. Gen. Stat. § 163–123. The total presidential vote was 2,134,370. The total vote for governor was 2,180,025. In the presidential vote, the New Alliance Party obtained 5,682 votes and the Libertarian Party write–in candidate received 1,263 votes.

1992 Libertarian Party Ballot Access

12. North Carolina General Statutes § 163–95(b) requires that any petitions filed with the State Board of Elections first be presented to and examined by the chairman of the county board of elections of the county in which the signatures were obtained. The chairman of the county board of elections (or the chairman's designee) must examine each signature on the petition determine that the signatory is qualified and registered to vote; place a check mark by the name of each person found to be qualified; collect a sum of money equal to a charge of five cents per name for each name appearing on the petitions presented; attach a certificate to the petition stating that the signatures have been checked; indicate the number of qualified signatories in the certificate

and return the certified petitions to the person who presented them.

13. The petition may be presented at any time to the chairman of a local board of elections but the statute sets a deadline of 5:00 p.m. on the fifteenth day preceding the date the petitions are due to be filed with the State Board of Elections in which the new party desires to participate. The verification process must be completed within two weeks from the date a petition is presented and the required fee is paid. The deadline for submission for the 1992 general election was May 15, 1992.

14. North Carolina General Statute § 163–96(a)(2) requires all petitions certified by county boards of elections to be filed with the State Board of Elections by 12:00 noon on June 1 of the year preceding the first general election in which the new party desires to participate. The deadline for the 1992 general election was 12:00 noon, June 1, 1992.

15. In order to satisfy the petition requirement of N.C. Gen. Stat. § 163–96 for the 1992 election, the Libertarian Party in North Carolina was required to obtain verified 43,600 signatures. By October of 1991, it had obtained over 64,00 signatures. However, after submission of the signatures on the petitions to the various county boards, only 37,601 signatures were validated. Libertarian Party officials discov–

ered a suspiciously high rejection rate in the three most populated counties (Wake, Mecklenburg and Forsyth) which declared over one–half of the signatures invalid. However, in the remaining 97 counties, the validation rate was approximately sixty–seven percent (67%).

16. Lynn Michael Fogwell, Chairman of the Libertarian Party, discovered that approximately ten per cent (10%) of the Wake County Board of Elections signatures declared invalid were actually valid. Three thousand seven hundred eighty–eight (3,788) signatures were resubmitted. Four hundred twenty four (424) were eventually validated. Nevertheless, the party was required to pay another five cent validation fee even with respect to those signatures previously rejected but now found valid. This produced an additional cost of $189.40.

17. Through similar revalidation, the Libertarian Party achieved the necessary signatures to qualify as a political party pursuant to N.C. Gen. Stat. § 163–96(a)(2) and to have the names of its candidates appear on the ballot for the 1992 general election. The party was required to pay over $3,200.00 for the validation and revalidation process.

18. In addition to the five cent signature validation fee, the validation process also involves expenses of paying for signature collection and notarization fees. Petitions for

political parties require that either the signer of the petition or the person who witnesses the signature, i.e. the petition collector, appear before a notary public or other oath-taker and declare the signatures to be genuine. The parties stipulated at oral argument that the notarization requirement presented a not insignificant burden in the overall petition process. Petitions for other candidates are not subject to the notarization requirement.

19. Not all states have the same ballot access requirements. For example, in South Carolina a political party need only obtain 10,000 signatures to be certified.

20. The Libertarian Party was certified as a new political party on May 20, 1992. On June 12, 1992, the State Board of Elections certified the list of Republican and Democratic Parties' nominees in the primary elections. On June 18, 1992, it sent this list to the county boards of elections and also notified the local boards of the Libertarian Party's status as a newly recognized political party and that voters could now affiliate with the party. Pursuant to N.C. Gen. Stat. § 163-98, the Libertarian Party was required to select its candidates by a party convention and certify the names to the State Board of Elections on or before July 1, 1992.

21. The Libertarian Party held its state convention on June 27, 1992 and nominated plaintiff McLaughlin for governor and candidates for other offices. The list of candidates was timely certified. The certified list of candidates sent by the Board to the Secretary of State and county boards of elections was identical to the certified list submitted by the Libertarian Party. A change in the designation of one the candidate's State House district was duly recorded. In August, a Libertarian Party senatorial candidate requested a correction in the spelling of his name which was accomplished.

22. The State Senatorial District #28 comprises all of Yancey, Madison and McDowell counties and portions of Buncombe and Burke counties. The Libertarian candidate for that district was left off the ballot in two of the counties. The omission was brought to the attention of the Burke County Board. On October 6, 1992 the candidate was shown two corrected versions of the ballot. Neither of these were in the same pattern as the remainder of the ballot. The candidate was required to select from one of the two versions wherein his name was separated from the other two candidates by a horizontal line. Corrected ballots were prepared. The candidate's name was also omitted on the McDowell County ballot. In both situations, they were reprinted before the

general election and all absentee or one-stop voters were given an opportunity to correct their vote.

Plaintiffs' Registration Efforts

23. From 1988 to 1992, registered voters in North Carolina increased from approximately 3,400,000 tc 3,800,000. Persons not registering as either Democrat or Republican increased from approximately 168,000 to 287,00.

24. The Libertarian Party uses voter registration records to help target the party's campaign support efforts as well as promote additional voter support.

25. Registration books closed for the 1992 general election on October 5, 1992. By this time, 677 person registered as members of the Libertarian Party.

26. Prior to the close of registration for the 1992 election, the Libertarian Party experienced five incidents of registration difficulty.

a. On august 17, 1992, at a rock concert, the Democratic Party was registering voters. The registrar had not been notified that the Libertarians were a recognized party and she would not register persons as Libertarians until a registered Libertarian party member showed her the registration card with the Libertarian Party name on it.

b. On August 20, 1992, an individual was told by a special registration commissioner at the Watson-

Matthews office in Carteret County that she could only register as Democratic, Republican or unaffiliated.

c. On September 30, 1992, in Forsyth County, a voter was only offered the choices of Democrat, Republican or Independent for party affiliation.

d. At an undetermined time, a registrar in Rowan County was not aware that a person could register as a Libertarian. When the voter's husband produced his Libertarian registration card, his spouse was allowed to likewise so register.

e. At another undetermined time, in Stanly County, a person trained to act as a special registration commissioner was never given any information about the new status Libertarian Party.

Actions Taken by the Secretary of State and/or Local Boards of Elections

27. On September 23, 1992, the Publications Division of the Department of the Secretary of state compiled and issued a publication entitled "1992 Candidates List." The first part of the publication listed only candidates for the Democratic and Republican parties. Candidates for the Libertarian Party, Write-in and Unaffiliated Candidates were listed in the back in Addendum A.

28. The Rowan County Board of Elections published and distributed a pamphlet entitled "Rowan Voter Guide." The portion of the pamphlet under the heading "Party Affiliation" read: "When you register, you will be asked to declare your party affiliation. You may register in one of the following ways: *Democratic *Republican *Unaffiliated."

29. The Person County Board of Elections published and distributed a pamphlet entitled "Person County Voter Guide." The portion of the pamphlet under the heading "Party Affiliation" read: "When you register you will be asked to declare your party affiliation. You may register in one of the following ways: .Democratic .Republican .Unaffiliated."

30. The Election Boards Association of North Carolina published and distributed a pamphlet entitled "Voting in North Carolina." The portion of the pamphlet under the heading "Do I have to register party affiliation?" read: "In North Carolina there are two recognized political parties, but the voter has the option to register Unaffiliated."

31. The Wake County Board of Elections published and distributed a pamphlet entitled "Voter Guide for Wake County." the portion of the pamphlet under the heading "Party Affiliation" read:

> When you register, you will be asked to declare your party affiliation. You may register

with any recognized party in the State of North Carolina. Party affiliation determines the primary in which a voter is eligible to vote. You may also register unaffiliated. During a partisan primary election, an unaffiliated voter may vote only in a party primary that authorizes unaffiliated votes.

32. An employee of the Buncombe County Board of Elections, in response to a telephone inquiry where the caller did not reveal his name, when asked about candidates in races where there was a Libertarian Party candidate, gave the names of the Democratic and Republican candidates but did not give the name of the Libertarian Party candidate.

The 1992 Libertarian Campaign for Governor

33. The Libertarian Party campaign for governor produced 173 radio commercials and 200 television commercials in the four to five major markets. It issued numerous press releases and participated in voter education programs and received endorsements from advocacy groups. Candidate McLaughlin traveled over 12,000 miles and participated in 44 television, radio and newspaper interviews. He requested to participate in televised gubernatorial debates but was not allowed to do so.

34. The Libertarian Party intends to run candidates in future elections in North Carolina, including but not limited to

the 1993 municipal elections and the 1994 and 1196 general elections.

35. The Libertarian Party's gubernatorial committee showed expenditures of $15,707.60 to obtain a vote total of 104,983. This is a cost per vote of $0.15. The Democratic contender spent $5.10 per vote and the Republican contender spent $5.04 per vote. The average expenditure for winning candidates for the North Carolina House of Representative seats was $18,509.29.

1992 Election Result

36. The Libertarian Party obtained ballot access in all fifty states and the District of Columbia in 1992. The party and its political action committee (51–92) spent a total of $505,000.00 to obtain ballot access. Forty–two thousand dollars ($42,000.00) was spent in North Carolina for this purpose.

37. The single most expensive item in the Libertarian Party's national campaign for the presidency was ballot access costs.

38. No Libertarian Party candidate was elected to any office but the party intends to sponsor candidates in future elections.

39. The total vote in the 1992 general election for presidential electors was 2,611,850 distributed as follows:

Democratic 1,114,042; Republican 1,134,611; Libertarian 5,171; Unaffiliated (Perot) 357,864; New Labor (write-in) 41; New Alliance (write-in) 59 and Socialist Workers (write-in) 12. The total vote for governor was 2,595,184 of which the Libertarian candidate received 104,983. Thus, the Libertarian Party's candidate for governor received over four (4%) of the votes cast which was twice the number of signatures originally required to become a certified political party, but well under the ten percent (10%) required by N.C. Gen. Stat. § 163-96(a)(1) to remain certified.

II.

Discussion of Law

In Burdick v. Takushi, 504 U.S. ___, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the Supreme Court emphasized that while voting is one of the more fundamental rights under our constitutional structure, such a right is not absolute. Both practically and because of specific provisions in the Constitution, the government will necessarily not only have an interest but a duty to make sure the electoral process produces order as opposed to chaos. Burdick v. Takushi, 119 L.Ed.2d at 253. Electoral laws inevitably place some burden and restrictions on voters. However, the state's important duty to maintain order would be unduly, if not dangerously, circum-

scribed by requiring it to advance a compelling state interest for every electoral law restriction. Id.

The Supreme Court placed its imprimatur on the analysis set out in Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Because each case will involve different rights and interests, a flexible, case specific standard is to be employed in reviewing challenges to election laws. Burdick v. Takushi, 119 L.Ed.2d at 253. A court must:

> [w]eigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." Id. [Anderson v. Celebrezze], at 789, 75 L.Ed.2d 547, 103 S.Ct. 1564; Tashjian [v. Republican Party of Connecticut, 479 U.s. 208], supra, at 213–214, 93 L.Ed.2d 514, 107 S.Ct. 544.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Norman v. Reed, 502

> U.S. ___, ___, 116 L.Ed.2d 711, 112 S.Ct. 698 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteen Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. Anderson supra, at 788, 75 L.Ed.2d 547, 103 S.Ct. 1564; see also id., at 788–789 n.9, 75 L.Ed.2d 547, 103 S.Ct. 1564.

Id. 119 L.Ed.2d at 253

At first blush it may appear, because voters are the primary blocks of a democratic system, that voting qualification restrictions should be subjected to a more demanding test, whereas the rights of candidates or groups to get on an electoral ballot may be viewed under a less rigorous standard. However, the Supreme Court does not find such distinctions to be per se determinative because the rights of voters and the rights of candidates to access to the ballots do not permit a neat separation. Id. 119 L.Ed.2d at 256. Laws which affect candidates necessarily impact on voters. Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). The same is true with respect to political parties which may embody interests of even greater concern than mere individual candidates. Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 286, 73 L.Ed.2d 508 (1982); Patriot Party of Pennsylvania v.

Mitchell, 826 F. Supp. 926, 934 n.7 (E.D. Pa.), aff'd, 9 F.3d 1540 (3d Cir. 1993).

Nevertheless, it is only when the restrictions are real and substantial, that the Court must review them under the heightened standard. Patriot Party of Pennsylvania v. Mitchell, 826 F. Supp. at 934 n.7. The electoral process has the fundamental function of selecting one out of the field of candidates for a particular office, as opposed to merely providing an outlet for short term political goals or frustrations. Burdick v. Takushi, 119 L.Ed.2d at 256. "Attributing to elections a more generalized expressive function would undermine the ability of the states to operate elections fairly and efficiently." Id.

Consequently, in reviewing cases such as the instant one which involve questions of ballot access, the Court will employ a more heightened standard requiring a greater showing of compelling state interests only to the extent the restrictions to the ballot are found to be severe, such as being exclusionary. Patriot Party of Pennsylvania v. Mitchell, 826 F. Supp. at 934. Except for the equal protection violations, none of the challenges presented in this case, alone or in combination, can be deemed severe. However, when a restriction violates the Equal Protection Clause of the Fourteenth Amendment, the Court must apply a strict scrutiny or

fundamental right standard of equal protection analysis. Norman v. Reed, 502 U.S. ___, 112 S.Ct. 698, 116 L.Ed.2d 711, 723 n.8 (1992); and Anderson v. Celebrezze, 460 U.S. at 786 n.7 (citing Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1068); Bullock v. Carter, 405 U.S. 134; and Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974)). Under this test, differing treatment may not be arbitrary but must bear some relevance to the object of the legislation. Bullock v. Carter, 405 U.S. 134; and Patriot Party of Pennsylvania v. Mitchell, 826 F. Supp. at 934. Of course, the discrimination must also be shown to be invidious. American Party of Texas v. White, 415 U.S. 767, 781, 94 S.Ct. 1296. 39 L.Ed.2d 744 (1974). As will be seen, this case presents just such problems.

A.

Constitutionality of N.C. Gen. Stat. § 163–97 that Recognized Minor Party Must Obtain Ten Percent of the Vote to Retain Ballot Access

Plaintiffs allege that the North Carolina statutory scheme violates the First and Fourteenth Amendments to the United States Constitution in that it violates the rights of association, free speech, and access to the political system. Before examining the argument, it will be helpful to take a look at the election laws in question.

Plaintiffs' first attack is on the laws defining and regulating the existence of political parties. In order to be recognized by the state and allowed access to the ballot, a political party must fulfill one of two prerequisites. N.C. Gen. Stat. § 163–96(a). The first defines an established political party as:

> Any group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors;

N.C. Gen. Stat. § 163–96(a)(1). The Court will refer to this class of party as a major party. A second type of political party is defined as:

> Any group of voters which shall have filed with the State Board of Elections petitions for the formulation of a new political party which are signed by registered and qualified voters in this State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor.

N.C. Gen. Stat. § 163–96(a)(2). This class of party will be referred to as a recognized minor party.[1] It includes newly

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[1] North Carolina refers to such parties as new parties (see N.C. Gen. Stat.§§ 163–96 and 163–98) even though they may be a pre–existing political organization. This is likely

formed and existing political organizations which are seeking ballot access for the first time or which previously had obtained such access but did not receive ten percent (10%) of the vote for governor or president in the last election.

The candidates of both major and recognized minor parties are allowed to identify their party affiliation on election ballots. Also, voters may register their party affiliation with either a major or recognized minor party. However, the recognized minor party, which has just obtained ballot access, nominates its candidates through the convention process, N.C. Gen. Stat. § 163–98, as opposed to primary elections, N.C. Gen. Stat. § 163–104. If the recognized minor party wins ten percent (10%) of the vote, it will then nominate candidates via the primary election process for the next election.

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because a party first obtains official recognition by going through the petition process and is, thus, a newly recognized party. Even though a party may have gained ballot access in the previous election, if it did not obtain ten percent (10%) of the vote for governor or president (N.C. Gen. Stat. § 163–97), it will still be considered a "new" political party when again it petitions for and obtains ballot access for the next election. To avoid the confusion of calling an existing political party such as plaintiff a new party, the Court will refer to such groups as minor political parties.

Recognition as a political party is not permanent. Any party which "fails to poll for its candidate for governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for governor or for presidential electors at a general election . . . shall cease to be a political party within the primary and general election laws . . . ." N.C. Gen. Stat. § 163–97. Such a party is deemed to have expired from official recognition. N.C. Gen. Stat. §§ 163–97 and 163–97.1. It will not be able to use the primary election process to nominate candidates for the next election. Consequently, once a party has "expired," registered voters of that party will have no primary in which to vote and are required to change their affiliation to a recognized party or be designated as unaffiliated. N.C. Gen. Stat. § 163–97.1.[2] Of course, after a party "expires," it may again obtain status as a recognized minor party by petition as provided for in N.C. Gen. Stat. § 163–96(a)(2).

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[2] The parties stipulated at oral argument that the normal procedure to implement this change is that said voters are sent a communication telling them that they have a right to designate their affiliation with any recognized political party, i.e. one which has received ten percent (10%) of the vote. Voters are given time to make such an election. However, if they fail to do so, election board officials change the affiliation to "unaffiliated."

In their brief, plaintiffs argue that the requirement that a recognized minor party obtain ten percent (10%) of the gubernatorial or presidential vote places an undue burden on a minor party's right to ballot access. However, at oral argument, plaintiffs conceded, and correctly so, that North Carolina's requirement that a party receive ten percent (10%) of the votes cast in an election for ballot access is, standing alone, constitutional. Indeed, such a standard is supported by case law. Jenness v. Fortson, 403 U.S. 431, 439–440, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (requirement of 20% of vote to be a political party is constitutional); Patriot Party of Pennsylvania v. Mitchell, 826 F. Supp. at 937 (requirement of 15% of registered voters to become a major political party upheld); Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1892, 77 L.Ed.2d 282 (1983) (10%).

A state has a legitimate, i.e. important regulatory, interest in demanding that a party have a significant modicum of support before it should be allowed to have its name on the ballot. Jenness, 403 U.S. at 442. Consequently, at oral argument, plaintiffs restricted their challenge to contending that the disparity between the two percent (2%) ballot access requirement of N.C. Gen. Stat. § 163–96(a)(2) and the ten percent (10%) retention requirement of N.C. Gen. Stat. § 163–

97 is arbitrary, capricious and unnecessary. They argue that the state has no legitimate interest in this two-tier system and that it creates an unconstitutional burden on new parties. The Court disagrees.

It is well established that a state may impose reasonable restrictions to limit access to the ballot and control the number of parties and candidates appearing on the ballot. Appropriate reasons for these restrictions include guarding against splintered parties, ensuring political stability, preventing frivolous or fraudulent candidacies and assuring that the victor is the choice of at least a strong plurality of voters. Storer v. Brown, 415 U.S. 724, 729, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); Bullock v. Carter, 405 U.S. at 145; Jenness, 403 U.S. at 442; Williams v. Rhodes, 393 U.S. at 24.

The Supreme Court has noted that a central concern of the founders of our republic is the need to avoid factionalism. Storer, 415 U.S. at 736 ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison).") The cacophony of disputing voices from numerous small parties could drown out voices seeking political consensus. "Moreover, a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent

candidacies." Jenness, 403 U.S. at 442 (emphasis added). It is not the duty of this Court to find whether there is an easier way for a party to gain access to the ballot, but only to decide whether the restrictions placed on a party are unduly burdensome.

North Carolina, in the interest of preventing factionalism and general confusion, has established a two-tier system differentiating between ballot access and ballot retention which is similar to that created by other states. These two-tier systems have consistently withstood court scrutiny. In Jenness, the Supreme Court evaluated a two-tier system that created two distinct political groups. A "political party" and a "political body." A "political party" was one whose candidate received twenty percent (20%) or more of the vote at the most recent gubernatorial or presidential election. A "political party" had to choose its candidate through a primary election. A "political body," on the other hand, could have its candidate's name on the ballot if it has obtained signatures from five percent (5%) of electors eligible to vote in the last election. Id. at 433-34. This two-tier system was upheld. Id. at 440. The same results have obtained in the lower courts. Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (5% ballot access - 10% retention); Socialist Workers Party v. Hechler, 696 F.Supp. 190, 193 (S.D. W. Va. 1988),

aff'd in part, 890 F.2d 1303 (4th Cir. 1989), cert. denied, 495 U.S. 932, 110 S.Ct. 2173, 109 L.Ed.2d 502 (1990) (1% ballot access – 10% retention); see also Baer v. Meyer, 728 F.2d 471 (10th Cir. 1984) (two–tier system – 10% retention). Thus, two–tier systems even more rigorous than North Carolina's have been recognized as valid.

The fact that North Carolina has chosen to make ballot access easier[3] does not logically require it to make ballot retention easier as well. The purpose of the two vehicles for showing support among the electorate has two entirely different purposes. While both ensure that the election ballots are not cluttered by numerous small groups, the lower ballot access requirement actually gives a group a chance to prove itself when it otherwise would be kept off the ballot. It is an

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[3] North Carolina has chosen to make ballot access relatively easy by only requiring a gathering of signatures of two percent of the people who voted in the last general election. This is far below the five percent (5%) level which, standing alone, is presumptively permissible. American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744, 764 (1974). And, it needs to be pointed out that the two percent (2%) requirement only includes the percentage of the number of persons who voted in the last election as opposed to registered voters, which number may be considerably larger. Compare Jenness v. Fortson, 403 U.S. 431, 432, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

inclusive, not an exclusive policy — a safety valve promoting political participancy while protecting the ballot. However, if a party cannot show a significantly increased interest in its candidates after campaigning for them, the state has a right to question whether that party should advance to the next step, which is running candidates in the primary elections. It is not unfair to expect a party to improve its showing of support from the petition process in order to be accorded automatic ballot access, including that of the primary elections.[4] Of course, whether that extra percentage should be five percent (5%), eight percent (8%), or ten percent (10%) is not a matter for the Court to resolve. It is sufficient to find that the ten percent (10%) level, standing alone, as conceded by plaintiffs, is a constitutional one.

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[4] The Court also notes that plaintiffs have not made a very strong showing of support in this case. They can only point to one election, the 1992 election for governor, where they have received greater than two percent (2%) of the actual votes. That candidate received about four percent (4%) of the vote. This single showing does not suggest that a political party with a strong modicum of support has been victimized or frozen out by the two-tier ballot access-retention system. Indeed, the four percent (4%) level is still below even the five percent (5%) ballot access level approved by the Supreme Court. American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744, 764 (1974).

Finally, small parties receive benefit from the two-tier system which plaintiffs fail to acknowledge. A major party is required to nominate candidates through the primary process which can be expensive and require a significant number of party members. On the other hand, the recognized minor party does not have that "Procrustean requirement of establishing elaborate primary election machinery." Jenness, 403 U.S. at 438. It may use the nomination convention until it reaches the ten percent (10%) level. Considering all of these factors, the two-tier system is a reasonable and legitimate one for the state to impose.

B.

Disaffiliation

Plaintiffs next argue that North Carolina's disaffiliation requirement of N.C. Gen. Stat. § 163-97.1 is unconstitutional. As noted previously, Section 163-97.1 requires that if a party fails to achieve ten percent (10%) of the votes in a gubernatorial or presidential election, it is deemed not to exist for purposes of the primary and election laws. Consequently, all voters registered as members of that party are registered to an "expired" party and must either affiliate with a recognized party or be registered unaffiliated. Plaintiffs argue that they are arbitrarily denied access to the political system, freedom of association and treated unequally compared to the major

parties because of this requirement.[5] They claim they have a right to have this list maintained in order to keep track of their affiliates and avoid having their members re-register after every election.

Plaintiffs' argument assumes that the state has created the registration process in order to permit political parties to keep track of those voters who affiliate with them. However, a perusal of Chapter 163 of the General Statutes would seem to indicate a different purpose — that of allowing party

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[5] Plaintiffs asserted in their pleadings that this disaffiliation process had made it impossible for them to examine the voter lists and determine those voters who had registered Libertarian but were now designated unaffiliated because the Libertarians failed to meet the ten percent (10%) requirement of N.C. Gen. Stat. § 163-97. They claimed that this was unfair because established parties always can tell, both before and after the election, which voters affiliated with them.

At oral argument however, plaintiffs conceded that they were able to gain access to the voting records after the election and before they were corrected. The parties agreed at oral argument that plaintiffs could examine the registration lists for free any time that they are considered a political party by the state and may examine the list for a fee even when they are not. Furthermore, after the election they have access to the lists which must remain uncorrected for at least 90 days. N.C. Gen. Stat. § 163-97.1. Thus, they do not suffer any great burden in their access to the names of their party members.

affiliates to vote in party primaries and enable the state to regulate this voting. Only parties recognized by the state as an established party (receiving ten percent (10%) or more of the vote) may have primaries. N.C. Gen. Stat. § 163-104 et seq. The plaintiffs, however, after failing to receive ten percent (10%) of the vote are no longer considered a political party for any purpose and will have no primaries. Therefore, the state has no interest or need to continue to keep a list of that party's registered voters. Plaintiff's argument that the purging of their party's name unfairly deprives them of a record of their members is unpersuasive in light of the fact that the state is not in the business of keeping records for political parties' affiliates. That job belongs to the party itself.

Plaintiffs argue their position using two Tenth Circuit cases. In Baer v. Meyer, 728 F.2d 471, the Tenth Circuit, in a very fact bound decision, upheld a district court's decision to require the State of Colorado to permit affiliation designation for the Citizens and Libertarian Parties which had not obtained ten percent (10%) of the vote in order to be recognized as a major political party. The court spoke of "today's political realities" and the need for a political party to obtain information as the "key to successful political organizations and campaigning." Id. 728 F.2d at 475. Because voter registration was computerized, it found that the administrative

burden on the state would be relatively minor in that registration officials could merely use the letter "C" for Citizens Party and "L" for Libertarian Party. It carefully noted that its ruling would not require the Secretary of State to recognize any political organizations other than the two in front of it.

However, a little later in Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740 (10th Cir. 1988), the court permitted the State of Oklahoma to continue to use its similar disaffiliation statute. Like North Carolina, in Oklahoma, when a party obtained recognition by petition, it thereafter had to receive ten percent (10%) of the vote or it would lose its recognized status and affiliation privilege. While only three of the Oklahoma counties had computerized election records, the court held that the "administrative burden in and of itself would not be sufficient to justify infringing important associational rights . . . ." Id. at 747. Considering the slight administrative burden in conjunction with the state's greater interest in controlling the registration affiliation of fractional interests, the court upheld the statute.

The Court finds the Rainbow decision more persuasive. In neither Baer nor Rainbow Coalition, did the court identify the real interest behind voters listing their party affiliation. Rather, both decisions merely focused on the ancillary benefit, i.e. that listing of party affiliation provided

help to parties soliciting persons interested in their political goals. Notwithstanding, the court in Rainbow Coalition upheld laws restricting voter designation of party affiliation to major parties. The decision in Baer was limited to the two parties before the court and it was not clear whether the affiliation registration injunction would be indefinite or when the affiliation right would cease. These further difficult and unresolved issues persuade this Court that the Tenth Circuit's later decision in Rainbow Coalition as opposed to Baer should be followed.

The state has a legitimate interest in preventing "frivolous and insubstantial attempts to designate party affiliation on the registration form," Baer v. Meyer, 728 F.2d at 475, or the "registration of tiny factional interests," Rainbow Coalition, 844 F.2d at 747. Defendants do not argue that there is any great administrative burden in leaving the Libertarian Party designation on the record. But, that is not determinative. It is self–evident that if all political parties, no matter how small, had a right to have voters list themselves as being affiliated with them, the list would become sizeable; thereby posing possible administrative burdens and also causing confusion for registrars, such as trying to keep track of parties whose names are similar. The voters could suffer prejudice as well. Being affiliated with a

major party or being unaffiliated allows voters the possibility of voting in the primary elections. N.C. Gen. Stat. § 163–59. If numerous small groups were given affiliation rights, this would shut out those voters from the primary process, thereby possibly increasing the feeling of alienation and disenfranchisement. The dangers of factionalism, confusion, and overreaching would be significantly increased.

Under plaintiffs' theory, political parties have a right to affiliation designation which should never be eliminated. That position is not constitutionally supported nor is it practical. At some point the state must update its records in order to eliminate insubstantial and defunct parties. Small parties often wax and wane in strength. It would be overly burdensome and create a climate ripe for confusion to require a state to note the affiliation of every party, however minute or no matter how long defunct.

A party becomes insubstantial and irrelevant for the state's purposes when it is not eligible to participate in a primary election. At this time, the only reason for the state not to eliminate the party from the registration records would be to help promote the party. This is not a permissible state

purpose.[6] Therefore, the Court finds nothing unconstitutional in the state purging the designation of an "expired political party" from its records pursuant to N.C. Gen. Stat. § 163–97.1.

C.

Signature Verification Fee of Five Cents and Notarization Requirement of N.C. Gen. Stat. § 163–96(b)

Plaintiffs make a number of challenges to the constitutionality of N.C. Gen. Stat. § 163–96(b).[7] The Court will

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[6] In a post–argument submission, plaintiffs suggest as a compromise that parties which do not obtain ballot access be allowed to seek recognition as a party, and perhaps pay a fee, and that the state then keep track of their members. However, this still keeps the state embroiled in the process of tracking party affiliation solely to benefit parties for whom it is helpful. And, as will be discussed next, it would not be able to restrict applications from groups, no matter how small and numerous, based on financial ability to pay a fee.

[7] **§ 163–96. "Political party" defined; creation of new party.**

* * *

(b) Petitions for New Political Party. . . .

The petitions must state the name and address of the State chairman of the proposed new political party.

The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:

(1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify the validity of the signatures by appropriate notation attached to the petition, or

(2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition.

Each petition shall be presented to the chairman of the board of elections of the county in which the signatures were obtained, and it shall be the chairman's duty:

(1) To examine the signatures on the petition and place a check mark on the petition by the name of each signer who is qualified and registered to vote in his county.

(2) To attach to the petition his signed certificate

a. Stating that the signatures on the petition have been checked against the registration records and

first address the attack on the five cent signature verification fee and notarization requirements.

In order to achieve ballot access, the statute requires minor political parties to obtain verified signatures of two percent (2%) of the total number of voters who voted in the most recent general election for governor, including 200 registered voters from each of four different congressional districts. The signers of the petition or the person in whose presence the petition was signed must sign before an officer

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b. Indicating the number found qualified and registered to vote in his county.

(3) To return each petition, together with the certificate required by the preceding subdivision, to the person who presented it to him for checking.

The group of petitioners shall submit the petitions to the chairman of the county board of elections in the county in which the signatures were obtained no later than 5:00 P.M. on the fifteenth day preceding the date the petitions are due to be filed with the State Board of Elections as provided in subsection (a)(2) of this section. Provided the petitions are timely filed, the chairman of the county board of elections shall require a fee of five cents (5¢) for each signature appearing and shall proceed to examine and verify the signatures under the provisions of this subsection. Verification shall be completed within two weeks from the date such petitions are presented and the required fee received.

authorized to take acknowledgements and "testify to the genuineness of the signatures on the petition." This is often done by signing before notary publics who often charge for the service. Next, the petition is presented to the chairman of the appropriate county board of elections who examines the signatures on the petition to determine whether the signer is a qualified and registered voter of the county. The chairman must collect a fee of five cents for each signature appearing on the petition.

Plaintiffs argue that the five cent verification and the notarization requirement pose an undue burden on the right to ballot access or minor parties in violation of the First and Fourteenth Amendments. Plaintiffs point out that North Carolina is one of only three other states which impose a petition fee. (The others being Florida, Nevada and Utah). See Bradley A. Smith, Judicial Protection of Ballot-Access Rights: Third parties Need Not Apply, 28 Harv. J. on Legis. 167, 215 n.252 (1991). Plaintiffs also complain that the two-step process of requiring both signature acknowledgements (verification) and the verification fee produces an undue hardship on minor political parties. Finally, plaintiffs show that the five cent signature verification fee and notarization requirement is not uniform among all individuals or groups seeking ballot access and in any event it is only minor

political parties which must suffer both a five cent verification fee and notarization requirement. They postulate that they are unfairly deprived of a right to the political process by being required to spend a disproportionate amount of money on ballot access ($42,000.00) as opposed to presenting their issues to the public in the campaign ($16,000.00).

Defendants assert, as their sole justification for the signature verification fee, that the state has a right to recoup some of the costs of verifying signatures.[8] With respect to the notarization requirement, defendants argue that this is a

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[8] At oral argument and in their brief, defendants' counsel estimated the amount of time that it took to verify signatures and came up with a figure showing that at the five cents per signature county boards received $3.00 per hour for their work. However, the record does not contain actual facts concerning the amount of time needed to conduct the signature verification. Therefore, the Court cannot determine whether this five cent fee in fact is a reasonable justification. See Dixon v. Md. State Administrative Election Laws, 878 F.2d 776, 783–84 (4th Cir. 1989). Defendants not only have the burden of proof on that issue but must show "it is necessary to raise these revenues in this manner." Id. at 784. Furthermore, presidential preference primary candidates, N.C. Gen. Stat. § 163–213.5, must pay 10¢ per signature. No justification for this disparity has been presented. However, the Court need not resolve those matters on such grounds because the statute cannot be enforced for other, more serious, grounds.

legitimate procedure in order to prevent fraud so that a petition gatherer could not just take a telephone book and copy names.

The permissibility of a signature verification fee standing alone raises serious constitutional questions. A requirement of fee payment in order to gain ballot access may eliminate candidates and thus impacts not just on candidates but on voters as well. Clements v. Fashing, 457 U.S. at 964. The political tradition in this county is to greet with hospitality all candidates irrespective of their economic status. Id. Thus, a system which selects candidates based solely on the ability to pay a fee without providing alternative means for ballot access will violate the Constitution. Lubin v. Panish, 415 U.S. at 718. When a state advances an interest in attempting to regulate the ballot through filing fees in order to relieve the state treasury of certain costs, it must make a showing of necessity. Bullock v. Carter, 405 U.S. 134. For example, the actual cost of processing an application fee may be just such a reasonable and necessary cost. Id. 405 U.S. at 148 n.29.

The argument of a state that its fee defrays certain election or ballot access costs will initially be deemed suspect because of the nature of the right involved. Dixon v. Md. State Administrative Election Laws, 878 F.2d 776, 783 (4th

Cir. 1989). Costs which "appear to be simply concomitant of the State's legislative choice to hold an election" are not costs which a state may charge to a candidate. Id. while the state argues that the costs merely reflect time spent checking signatures, it has not presented actual figures detailing the costs as required. Id. Nor has it justified the total amount of the fee ($3,200.00) in relation to costs assessed for other services or to other candidates. While these deficiencies raise questions about the continued permissibility of fee verification charges, there is the additional problem that the petition must be notarized which itself produces a not insubstantial burden on minor parties.

The notarization requirement by itself has been upheld albeit in different circumstances. In Libertarian Party of Va. v. Davis, 766 F.2d 865 (4th Cir. 1985), cert. denied, 475 U.S. 1013, 106 S.Ct. 1190, 89 L.Ed.2d 305 (1986), the court recognized that a state had an interest in assuring the genuine-ness of signatures and, therefore, could impose a notarization requirement. It adopted Judge Mehridge's reasoning in Howlette v. City of Richmond, Va., 485 F. Supp. 17 (E.D. Va.), aff'd, 580 F.2d 704 (4th Cir. 1978). However, Judge Mehridge reached his decision on a number of grounds. One of them was that plaintiffs failed to sufficiently meet their burden of proof by showing that the notarization requirement

was impractical or unusually burdensome. The court of appeals affirmed and specifically cited American Party of Texas v. White, 415 U.S. at 786, where the Supreme Court rejected a challenge to notarization based on burdensomeness because the parties failed to demonstrate on the record impracticality or unusual burden.[9]

The instant case is unusual in that North Carolina has both a notarization and a verification requirement. Further-

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[9] A burden of signature verification or notarization fee is a factor which a court may consider in evaluating impediments to ballot access. The Supreme Court in Jenness v. Fortson, 403 U.S. 431, 439, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971), made a point of noting the lack of a notarization requirement in assessing the combination of restrictions which might have made the petition requirement unduly burdensome. In the instant case, petitions must be obtained in at least four different congressional districts, thereby increasing the number of petition gatherers needed and the burden of the notarization requirement.

There are ways to ameliorate the financial burden of a notarization requirement. In Merrit v. Graves, 702 F. Supp. 828 (D. Kan. 1988), the court upheld a notarization requirement. However, there the notarization service was provided free of charge by county election officers or election commissioners. The court also found as a fact little evidence that the expense had an inhibiting effect. Id. at 832. Also, the state could accept unsworn declarations under penalty of perjury. See 28 U.S.C. § 1746.

more, only minor political parties are subject to both requirements. The ostensible purpose of both is to prevent fraud by making sure only qualified voters sign the petition. The state has not advance an interest in having both requirements, and then only imposing them on minor parties. The Court need not render a decision as to whether the signature verification requirement and the notarization requirement are independently constitutional. It is sufficient that the combination of both requirements in connection with the uneven application of them to minor political parties justifies their being enjoined. The North Carolina signature verification fee and notarization requirements of N.C. Gen. Stat. § 163-96(b) run afoul of the Equal Protection Clause of Fourteenth Amendment of the United States Constitution because of their uneven application.

There are four classes of individuals or organizations which must pay the signature verification fee. As previously noted, N.C. Gen. Stat. § 163-96(b) to pay five cents pe name for two percent (2%) of the voters. Pursuant to N.C. Gen. Stat. § 163-123 write-in candidates must present a petition containing the names of 500 qualified voters and are charged a five cent per name verification fee. Unaffiliated candidates for state-wide office must collect petitions containing the names of two percent of the voters and pay a five cent signature verification fee. N.C. Gen. Stat. § 163-122.

Presidential preference primary candidates may be nominated by the petition process and are charged a ten cent a signature verification fee. N.C. Gen. Stat. § 163–213.5.

There are two category of candidates or groups wherein no signature verification is required. The first is party primary candidates who do not pay the filing fee. They must obtain petitions for which no signature verification fee is required. N.C. Gen. Stat. § 163–107.1. Second, North Carolina does not charge signature verification fees for groups which petition to get referendum propositions on the ballot. Examples of such petitions are as follows: referendum issues for fire protection districts, N.C. Gen. Stat. § 65–25.1; change of the form of municipal government, N.C. Gen. Stat. § 160A–104; to approve the sale of alcoholic beverages, N.C. Gen. Stat. § 18A–601. Finally, none of the above categories, whether they are charged a signature verification fee or not, has a notarization requirement, except for those persons wishing to form a political party pursuant to N.C. Gen. Stat. § 163–96(a).

The state argues, as it must, that North Carolina has a legitimate and compelling reason to establish various classes with respect to ballot access. For example, it argues that it has the right to distinguish between a political party, which can nominate a number of different candidates, and write–in

or unaffiliated candidates which only represent one person. The state also attempts to distinguish referendum issues as being an animal of a different species and, therefore, not fairly compared to minor party candidates. Finally, with respect to the fact that individuals who associate with a major political party may obtain ballot access without paying a signature verification fee, defendants argue again that this does not favor a major party but rather recognizes the distinction between a minor political party and an individual candidate of a major party.

An immediate problem arises with this last foundation pin of the argument. North Carolina does not charge petition verification fees for candidates for major parties who wish to get on the primary ballot, but does charge, not only minor parties, but unaffiliated candidates such fees.[10] Thus, the state treats unaffiliated candidates differently. Under these circumstances, it appears that North Carolina's different economic treatment of unaffiliated candidates is likely unconstitutional. See Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992); and Dixon v. Md. State Administrative

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[10] Unaffiliated candidates need not pay a filing fee, but must pay the signature verification fee. There is no alternative means of getting on the ballot. N.C. Gen. Stat. § 163-122.

Election Laws, 878 F.2d 776. However, the state cannot justify the discriminatory treatment of minor parties by pointing out that it treats other groups, i.e. unaffiliated candidates, unconstitutionally as well.[11]

In Fulani, the court found that Florida law permitted a waiver of the signature verification fee for any candidate, group or person, including independent candidates or organizations presenting referendum issues, but did not permit a waiver for minor parties. It held that the state could not justify favoring identified political groups based on associational preferences. Id. at 1544. It also noted that the burden was a significant one because it forced a party to part with funds needed for an effective campaign and made it more difficult for a minor party to qualify. In justification, the state asserted a variety of interests, such as the qualitative difference between an independent candidate and a party candidacy. However, such a self-justifying explanation for disparate economic treatment was rejected.

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[11] While the constitutionality of the signature verification fee for write-in candidates, unaffiliated candidates and presidential preference primary candidates may be questionable for lack of an alternative non-economic means of ballot access (see Dixon v. Md. State Administrative Election Laws, 878 F.2d 776 (4th Cir. 1989) ($150.00 filing fee), that issue is not raised or decided in the instant case.

The state's asserted interest of assuring that a party has an ongoing political organization with a distinctive character was deemed to be one of diminished importance. Id. at 1546. The state does not have a legitimate interest in determining which financially burdened candidates or political parties have a right to waive the verification fee. Id. And, as has been noted previously, the court found in an area of economic qualification, the state's interest was severely restricted. Id. at 1547. Finally, it further noted, that (as is true in North Carolina) the state did not just classify on the basis of individuals versus groups because referendum organizations similarly were allowed to waive the petition fee, but a group of individuals forming a minor party could not. Id. a 1547.

All of these reasons for striking down the invidious discrimination of the signature verification fee against minor political parties exist in the instant case. The state has failed to provide any justification for unevenly applying the signature verification fee. It fails to provide alternative routes to ballot access for impecunious individuals or groups except for candidates of major political parties. It advances no reason for favoring major party candidates. Such action has the effect of freezing the status quo by favoring major party candidates. Nor has the state justified favoring referendum group petitions, which pay nothing, over independent candi-

dates and minor political party petitions. Lacking justification, the Court cannot find that these distinctions are supported by a compelling necessity or even some rational interest. Id. The defendants pointed out at oral argument that the statutes arrived in their present position through piecemeal amendment and, therefore, the discrepancies likely were not planned. While quite understandable, that explanation does not suffice to prevent a finding of the statute's unconstitutionality.

There is a further problem with N.C. Gen. Stat. § 163-96(b). Only minor political party organizations must face the double ballot access expense of signature verification fee and costs for notarization of signatures. The state has no explanation for this discrepancy except to point out that again it likely was a vestigial remain from the piecemeal amendment of election laws. If there were any doubt previously, the dual combination requirement clearly, unduly burdens minor party resources and violates equal protection. Consequently, the state should be enjoined from enforcing that paragraph of N.C. Gen. Stat. § 163-96(b) requiring:

> The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:

(1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify the validity of the signatures by appropriate notation attached to the petition, or

(2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition[,]

and the further requirement that the county board of elections "shall require a fee of five cents (5¢) for each signature appearing" on the petitions.[12]

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[12] Plaintiffs also contend that part of N.C. Gen. Stat. § 163–96(b) which requires a five cent a signature verification fee is unconstitutional as applied. Here, plaintiffs argue and present some evidence that approximately ten percent of the signatures declared invalid were actually valid signatures. This amount appears to be not insignificant. In addition, when the invalidated signatures were resubmitted, plaintiffs were charged an additional five cent fee for validating the previously incorrectly invalidated signatures. Thus, plaintiffs were charged a double fee for some of the validated signatures.

Plaintiffs do no request monetary relief for this double charging. Nor, at oral argument, when the Court indicated that such a challenge by plaintiffs would require a trial, did

D.

Petition Language of N.C. Gen. Stat. § 163–96(b)

Plaintiffs next argue that the language in N.C. Gen. Stat. § 163–96(b) required to be used by political parties on their ballot access petition unconstitutionally requires voters to express an intent to organize a political party. Pursuant to N.C. Gen. Stat. § 163–96(b), North Carolina requires that the heading of the petition proclaim in large capital letters: "THE SIGNERS OF THIS PETITION INTEND TO ORGANIZE A NEW POLITICAL PARTY TO PARTICIPATE IN THE NEXT SUCCEEDING GENERAL ELECTION." Plaintiffs argue that this language confuses voters who are asked to sign by making them believe that they must actively participate in the organization of this political group. This confusion allegedly makes the petitioning process more difficult for plaintiffs and misrepresents the purpose of the petition.

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plaintiffs wish to pursue the issue. Instead, plaintiffs consented to a stipulation wherein defendants agreed to enact regulations before the next election which would have the purpose of reducing the high rate of incorrectly invalidated signatures and correct the problem of charging double for signatures incorrectly invalidated but then subsequently validated. However, in light of the instant recommendation, this stipulation may well be moot.

Plaintiffs show that the history of this language likely arose out of dicta appearing in N.C. Socialist Workers Party v. North Carolina State Bd., Etc., 538 F. Supp. 864 (E.D.N.C. 1982). That suit also involved a minor political party's challenge to the constitutionality of N.C Gen. Stat. § 163–96(b) as previously written. At that time, the statute required that a voter signing a petition for a new political party change his or her affiliation to that party, thereby prohibiting the signatory from voting in a party primary election. In ruling on a motion for a preliminary injunction, the court had before it sufficient affidavits demonstrating voter inhibition to signing the petition for fear of losing a valuable voting right. Consequently, the court prohibited the state from using the words of prior N.C. Gen. Stat. § 163–96(b) whereby the voter both petitioned "for the formation of a new political party" and requested a change in party affiliation. The court's main concern was the impact of the language requiring the change of party affiliation by signing the petition. It found that the state could accept evidence of public support without requiring disaffiliation. This resulted in a dicta suggestion that the state might use a statement of "intent to organize a new party." Id. at 867 n.5. Whether the legislature, in re–writing N.C. Gen. Stat. § 163–96(b), relied on the dicta in N.C. Socialist Workers Party or not does not change the equation.

The court's comments were only dicta and the specific challenge raised in this case was not then before that court.

The state claims no interest in using the particular words "intend to organize" and agrees that the language should reflect the purpose of the petition. The purpose of the petition is to demonstrate sufficient voter support for the Libertarian (or other) party so that it will become a legally recognized party in order to be placed on the ballot for the next election. The signer necessarily wants the party to be recognized and placed on the ballot. Implicit in this is that the party in question must be in existence and organized or in the process of being organized. The voter necessarily intends these matters as well. What the voter may not wish to do is to participate in the organization or further organization of the party.

The state has an understandable interest in making the petition purpose known in as few words as possible in order to avoid frustrating the petitioning process. However, the language must also be sufficiently clear to avoid voter confusion. In the instant case, the state has chosen the language "intend to organize" whereas, the parties agree that the principal purpose for signing appears to be that the voter wishes the party to be legally recognized so that it may appear

on the ballot for the next general election.[13] The language also suggests that the party is not yet organized. However, political parties such as the plaintiff Libertarian Party may well have a long and relatively successful existence as a minor party. It is understandable that the legislature may have chosen the words "intend to organize" because of the special nature of the North Carolina election laws which treat all newly recognized parties as new parties. Nevertheless, such language could possibly cause some minor confusion in that voters may think that the party seeking ballot access has no previous existence and/or that they are personally required to do some organizing. The question is whether such possibilities rise to a constitutional dimension.

Plaintiffs' challenge to the petition language is essentially a facial one. They have not presented sufficient facts, such as the plaintiffs did in N.C. Socialist Workers Party v.

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[13] Plaintiffs also argue that the difference between Sections 163-96(b) and 163-122 governing unaffiliated candidates violates equal protection. The latter statute reads: "THE UNDERSIGNED HEREBY PETITION THAT SUBJECT CANDIDATE BE PLACED ON THE APPROPRIATE BALLOT . . . ." Thus, the statutes have slightly different purposes, although both share the goal of ballot access. Rather than being discriminatory, a difference in the petition language is proper, if not necessary, to adequately inform the voter.

N.C. State Bd., Etc., 538 F. Supp. at 865, to show that numerous voters would have signed the petition had it not been for the offending language. Therefore, because the parties have stipulated that all facts which they would present at a trial are now before the Court, it is determined that plaintiffs have failed to show that the operation of N.C. Gen. Stat. § 163–96(b) petition language in fact deprived them of their constitutional rights. This, of course, would not foreclose a challenge to the petition language in the future upon presentation of sufficient evidentiary support.[14] It does mean that the Court will only review the petition language to see if it is unconstitutional on its face.

Plaintiffs cite two cases in support of their position that the "intend to organize" language of N.C. Gen. Stat. § 163–96(b) imposes an unconstitutional restriction on voter–signers. They are: Socialist Workers Party v. Hechler, 890 F.2d 1303; and N.C. Socialist Workers Party v. N.C. State Bd., Etc., 538 F. Supp. 864. The Court finds both cases to be distinguishable and provide little support for plaintiffs'

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[14] Plaintiff's may feel that they can factually show that the language is unduly burdensome and decide to again bring suit. The state, however, lacking any significant reason to keep the language as it is, may wish to reexamine the language prior to that time.

argument. In Socialist Workers Party v. Hechler, the petition utilized to nominate candidates for a minority party stated that the person signing had a "desire to vote" for the candidate. The court found that this language violated a voter's right to have a secret ballot when voting and second, that this burden, placed only on small parties, violated the Equal Protection Clause. In N.C. Socialist Workers Party v. N.C. State Bd., Etc., the petition required that the signatory's voting registration would be change to the new parties, thus disaffiliating the voter from their prior party.

Both cases are distinguishable because they involved direct consequences to the signatories' voting rights, either in the primary or the general election. In one case, the signatory was forced to publicly reveal his vote, and in the other, to change his party affiliation and forfeit the right to vote in the primary election. The petition language in the present case does not interfere with any important right such as voting and, at worst, suggests that the person signing might be asked at some future date to help organize the party. However, whenever persons sign any petition they necessarily must expect that the consequences of their act will not end with the signing. They may well be contacted again in the future by party supporters asking for some money and help — which they can refuse. The wording presently required by N.C. Gen.

Stat. § 163–96(b) only, at most, minimally expands the necessary commitment and the expectation of intrusion. While the signer indicates an intent to organize the party, it has not been shown that reasonable people would take this to mean they would be bound to work for the party. The Court will not assume this to be so. On its face, the words cannot be so interpreted and plaintiffs fail to show otherwise in the course of their conducting petition drives.

Although somewhat imprecise, the language is reasonably calculated for its intended purpose. It does not convey sufficient misinformation so as to render it unconstitutional. Different language could certainly be selected to better convey the message that a political party is attempting to be placed upon the ballot. However, it is not the duty of this Court to craft such language. Rather, it is within the province of the legislature.

E.

Totality of Statutory Restrictions

Finally, the Court must examine whether the "totality" of North Carolina's statutory scheme violates plaintiffs' constitutional rights. In considering this issue, the Court must determine whether the laws, operating in conjunction, "freeze" the status quo by preventing all candidates, other than the two major parties, from any realistic access to the ballot. Jenness

v. Fortson, 403 U.S. at 439; American Party of Texas v. White, 415 U.S. at 783. "The concept of 'totality' is applicable only in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." Storer, 415 U.S. at 737. The primary inquiry is whether a reasonably diligent candidate or party can obtain access to the ballot. Id. at 742.

Plaintiffs assert that the combination of the five cent verification fee, the disaffiliation requirement, the misleading petition language, and the ten percent retention requirement act to freeze the status quo.[15] The Court finds that these

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[15] The disaffiliation of plaintiffs' registered voters after it failed to poll ten percent (10%) of the vote likely need not be considered in examining the totality of North Carolina's statutory scheme's effect on ballot access. This requirement has little effect on plaintiffs' ability to gain access to the ballot. Plaintiffs dislike the rule because they would like to use voter affiliation rolls kept for the purpose of holding party primary elections as a means to build their party. However, the state has no duty to allow a party to use its machinery to build party membership. Restrictions which are absolutely valid need not be considered in evaluating the totality of North Carolina's election laws or ballot access. See Storer v. Brown, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

requirements have not created such a barrier to the ballot as to freeze the status quo.[16]

In Williams v. Rhodes, 393 U.S. 23, the Supreme Court found that the totality of Ohio's statutory scheme froze the status quo making "it virtually impossible for a new political party . . . to be placed on the state ballot." Id. at 24. In Williams, the statutory scheme required a new party to obtain the signatures of fifteen percent (15%) of the qualified voters in the last gubernatorial election, over 400,000 signatures, and file the petitions by an early deadline date of February 7. The party would then be required to conduct a primary election conforming to a very rigorous statutory scheme. Id. at 27, 33. The Supreme Court found that the totality of these requirements violated equal protection by freezing out new parties from the election process.

In the present case, such heavy burdens do not exist. A new party need obtain the signatures of two percent (2%) of those who voted in the last state-wide election (around 45,000 signatures) to obtain access to the ballot. While the

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[16] This is particularly true in reference to future elections in light of the recommendation to declare the present notarization requirement and five cent verification fee unconstitutional. However, even if these burdens were included, ballot access has not been frozen.

filing deadline for petitions of May 15 arguably is somewhat early in the political season, Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d at 745 (May 31)), there are no restrictions on when a party may begin to obtain these signatures. Compare Libertarian Party of Fla. v. State of Fla., 710 F.2d 790, 799 (11th Cir. 1983), cert. denied, 469 U.S. 831, 105 S.Ct. 117, 83 L.Ed.2d 60 (1984) and cases cited. Thus, a party could obtain ballot access right after a general election and have voters affiliate with it almost two years before the next election. This would give the party plenty of time to use the voter rolls to gather names of sympathetic voters. Even if a party misses the two percent (2%) petition requirement, its candidates can get on the ballot as write-in candidates with only 500 signatures. Furthermore, a new party is not required to incur the expense of primaries but may pick its candidates by convention. Thus, the burden on plaintiffs does not approach that found to be unconstitutional in Williams. As to the ten percent (10%) retention requirement, it is valid and furthermore, it is not a barrier to ballot access because access can be obtained by meeting the two percent (2%) petition requirement.

The Court also finds based on the present record that, for the 1992 election, the expenses caused by the five cent verification fee and notarization were not so great in combi-

nation with the other restrictions so as to unduly impede ballot access. Plaintiffs have spent $42,000 for ballot access in 1992. Around $3,200 of that was in verification fees and some unestablished amount, presumably less than the verification fees, went to notarization. This would mean that the bulk of plaintiffs' expenses went to the gathering of signatures. Such expense is an expected and accepted part of a new party's access to the ballot. See American Party of Texas v. White, 415 U.S. at 793–794. The extra costs for signature verification fees and notarization costs in North Carolina may well be less than the signature collection costs in states requiring five percent (5%) signatures.

The history of recent elections fails to establish plaintiffs' contention. Prior to the 1984 elections, the signature requirement was only 10,000 people. Under this rule in 1976, three parties obtained enough signatures to be placed on the ballot; the American Party, Labor Party and Libertarians. In 1980, the Citizens Party, Socialist Workers Party and Libertarian Party obtained ballot access. In the 1984 elections, the signature requirement was raised to the present two percent (2%) of voters. This prevent some parties from obtaining enough support to obtain ballot access but certainly did not freeze access as demonstrated by the Socialist Workers Party and Libertarian Party both gaining ballot access in

1984. In 1988, the New Alliance Party met the two percent (2%) requirement and the Libertarian Party, although failing to do the same, conducted a write-in campaign. In the 1992 race, the Libertarian Party obtained ballot access while the New Alliance Party and Socialist Workers Party conducted write-in campaigns. The history of ballot access for minor parties in North Carolina conclusively demonstrates that the North Carolina statutory scheme does not freeze the status quo, but in fact gives minor parties a fair opportunity to gain ballot access.

Finally plaintiffs argue that several violations of election laws were committed during the 1992 election in various counties that in combination with the statutory scheme have frozen them out of the political process. Specifically, plaintiffs complain of five instances in which party members had difficulty registering as Libertarians. These errors did not prevent the individuals from eventually registering as Libertarian. Plaintiffs also complain that there were six instances where the state gave election information that failed to note that the Libertarian Party was on the ballot. Again, no adverse result has been demonstrated.

Plaintiffs have not presented any case law which would support their contention that the minor election errors in this case should be considered in combination with a state's

statutory scheme in order to determine whether state law freezes the status quo. When deciding whether a statutory scheme is unconstitutional under Williams, 393 U.S. 23, Jenness, 403 U.S. 431, and their progeny, minor election errors have not been part of the evaluation. Such errors, unless shown to be intentional or consistent from year to year, would appear only to effect a particular election, not the constitutionality of state election laws. However, even if such errors were considered in totality with the statutory restrictions, they are neither significant nor numerous enough to make the present laws unconstitutional. This is particularly true considering that the violations all occurred after plaintiffs had already gained access to the ballot. The errors clearly did not freeze the plaintiffs out of the political process.

IT IS THEREFORE RECOMMENDED that plaintiffs' and defendants' motions for summary judgment be granted in part and denied in part and that all plaintiffs' claims be dismissed except that it be declared that those parts of N.C. Gen. Stat. § 163–96(b) which provide:

> The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:
>
> (1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify

the validity of the signatures by appropriate notation attached to the petition, or

(2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition[,]

and the further requirement that the county board of elections "shall require a fee of five cents (5¢) for each signature appearing" on the petitions are unconstitutional as Chapter 163 of the North Carolina General Statutes is presently constituted and, therefore, pursuant to Fed. R. Civ. P. 65 that the defendants, their officers, and agents be enjoined from utilizing, requesting compliance with or enforcing the same.

/s/ Russell A. Eliason
United States Magistrate Judge

February 25, 1994

Filed Apr 19, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

SCOTT McLAUGHLIN, et. al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	2:93CV00100
	)	
NORTH CAROLINA BOARD	)	
OF ELECTIONS, et. al	)	
	)	
Defendants.	)	

ORDER

On February 25, 1994, the Recommendation of the United States Magistrate Judge was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Thereafter, the Court received plaintiffs' objections to the Recommendation of the United States Magistrate Judge.

The Court has appropriately reviewed plaintiffs' objections de novo and finds they do not change the substance of the United States Magistrate Judge's rulings which are affirmed and adopted.

NOW, THEREFORE, pursuant to the Recommendation of the United States Magistrate Judge, it is ORDERED

that plaintiffs' and defendants' motions for summary judgment are granted in part and denied in part and that all plaintiffs' claims are dismissed except that as to Count II of the Complaint and plaintiffs' Prayer for Relief, it is declared that those parts of N.C. Gen. Stat. § 163–96(b) which provide:

> The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:
>
> (1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify the validity of the signatures by appropriate notation attached to the petition, or
>
> (2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition[,]

and the further requirement that the county board of elections "shall require a fee of five cents (5¢) for each signature appearing" on the petitions are unconstitutional as Chapter 163 of the North Carolina General Statutes is presently constituted and, therefore, pursuant to Fed. R. Civ. P. 65 that

the defendants, their officers, and agents are enjoined from utilizing, requesting compliance with or enforcing the same.

/s/ Richard C. Erwin
Senior United States District Judge

April 19, 1994

Filed Apr 19, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

SCOTT McLAUGHLIN, et. al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	2:93CV00100
	)	
NORTH CAROLINA BOARD OF ELECTIONS, et. al	)	
	)	
	)	
Defendants.	)	

JUDGMENT

For the reasons set out in an Order filed contemporaneously with this Judgment,

IT IS ORDERED AND ADJUDGED that plaintiffs' and defendants' motions for summary judgment are granted in part and denied in part and that all plaintiffs' claims are dismissed except that as to Count II of the Complaint and plaintiffs' Prayer for Relief, it is declared that those parts of N.C. Gen. Stat. § 163-96(b) which provide:

> The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:

(1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify the validity of the signatures by appropriate notation attached to the petition, or

(2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition[,]

and the further requirement that the county board of elections "shall require a fee of five cents (5¢) for each signature appearing" on the petitions are unconstitutional as Chapter 163 of the North Carolina General Statutes is presently constituted and, therefore, pursuant to Fed. R. Civ. P. 65 that the defendants, their officers, and agents are enjoined from utilizing, requesting compliance with or enforcing the same.

/s/ Richard C. Erwin
Senior United States District Judge

April 19, 1994

STATUTORY PROVISIONS INVOLVED[1]

N.C.G.S. § 163–59 provides, in part:

§ 163–59. Right to participate or vote in party primary.

No person shall be entitled to vote or otherwise participate in the primary election of any political party unless he

(1) Is a registered voter, and

(2) Has declared and has had recorded on the registration book or record the fact that he affiliates with the political party in whose primary he proposes to vote or participate, and

(3) Is in good faith a member of that party.

Notwithstanding the previous paragraph, any unaffiliated voter who is authorized under G.S. 163–74(a1) may also vote in the primary if the voter is otherwise eligible to vote in that primary except for subdivisions (2) and (3) of the previous paragraph.

N.C.G.S. § 163–66 provides, in part:

§ 163–66. Custody of registration records and poll–books; access; obtaining copies.

In all counties the registration records, books, registration certificates, indexes, computer lists, discs, labels and tapes and other records of registration and voting shall be and

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[1] The language of the North Carolina statutes set out here is as they existed at the time relevant to this action, those applicable to the 1992 general election and its aftermath.

remain in the possession of the county board of elections. . . . It shall be the duty of the county board of elections, on application of any candidate, or the county chairman of any political party, or any other person, to furnish a list of the persons registered to vote in the county or in any precinct or precincts therein. . . . The county board shall furnish such lists and upon request, it may furnish selective lists according to party affiliation, sex race, date of registration, or any other reasonable category. In all instances, however, the county board of elections shall require persons to whom such lists are furnished to make full reimbursement for the expense incurred in preparing it. Notwithstanding the above however, the chairman of each political party in the county, as defined in G.S. 163–96, shall be entitled biennially, upon written request, to one free list of all registered voters in his county showing the name, address, sex, political affiliation and precinct of each registered voter, provided, that in counties having voter records maintained on electronic data processing equipment, such lists shall not be furnished biennially but instead on the following schedule: once in each odd–numbered, once during the first six calendar months of each even–numbered year, and once during the last six months of each even–numbered year. In addition to the typed, mimeographed, xeroxed or computer print–out lists required hereinabove, each county that provides voters' lists from computers shall, upon written request from the State chairman of each political party, provide once in each odd–numbered year, once during the first six calendar months of each even–numbered year, and once during the last six months of each even–numbered year a computer disc or tape containing the name, address, sex, race, age, political affiliation and precinct of each registered voter and it shall be the responsibility of each State chairman receiving such discs or tapes to provide them to candidates for election who are candidates of their respective political parties and who request such discs or tapes in writing. The free list to be furnished to

the county chairman of each political party shall group the registered voters by precinct and shall be furnished as soon as practicable but no later than 30 days after such request. The discs or tapes to be furnished to the State chairman shall be furnished as soon as practicable but no later than 30 days after such request, and the State chairman is required to return the tapes or discs to the county board of elections within 30 days after receiving them.

N.C.G.S. § 163–74 provides, in part:

§ 163–74. Record of political party affiliation or unaffiliated status; changing recorded affiliation; correcting erroneous record.

(a) Statement of Party Affiliation or Unaffiliated Status; Record Thereof. — Every person who registers to vote shall, at the time application is made, (i) state his desired political party affiliation or (ii) state that he wishes to be recorded as an "unaffiliated" voter. The person before whom the voter is registering shall record the affiliation requested by the voter. Such recorded party affiliation, or unaffiliated designation, shall thereafter be permanent unless, or until, the registrant changes it under the provisions of subsection (b) of this section.

If the applicant (registrant) refuses to declare his party affiliation upon request, or if the applicant refuses to further state that he desires to be recorded as unaffiliated, then the registrar or other officer shall inform the applicant that although he may register, his record shall be designated "unaffiliated" and he shall not be eligible to vote in any political party primary, except as authorized by a political party under G.S. 167–74(a1), but may vote in any general election.

(a1) Voting by Unaffiliated Voter in Party Primary. – – If a political party has, by action of its State Executive Committee reported to the State Board of Elections by resolution delivered no later than the first day of December preceding a primary, provided that unaffiliated voters may vote in the primary of that party, an unaffiliated voter may vote in that primary by announcing that intention under G.S. 163–50(a). For a party to withdraw its permission, it must do so by action of its State Executive Committee, similarly reported to the State Board of Elections no later than the first day of December preceding the primary where the withdrawal is to become effective.

(b) Change of Party Affiliation or Unaffiliated Status. — No registered elector shall be permitted to change the record of his party affiliation or unaffiliated status for a primary, second primary, or special or general election after the close of the registration books immediately prior to any such election. Any registrant who desires to have the record of his party affiliation or unaffiliated status changed on the registration book shall, no later than the twenty–first day (not including Saturdays and Sundays) before the election go the chairman or the supervisor or elections of the county board of elections or to other registration officials specified in G.S. 163–80 and request that the change be made. Before being permitted to have the change made, the chairman, supervisor of elections or other registration official shall require the registrant to take the following oath, and it shall be the duty of the elections officer to administer it:

(1) If the voter desires to change from one political party to another, or from unaffiliated to a political party:

I, ____, do solemnly swear (or affirm) that I desire in good faith to change my party affiliation from the _____ Party (or from unaffiliated status) to the _____ Party, and that

such change of affiliation be made on the registration records in the manner provided by law, so help me God.

(1) If the voter desires to change his affiliation with any political party to unaffiliated status:

I, ____, do solemnly swear (or affirm) that I desire in good faith to change my party affiliation with the _____ Party to unaffiliated, and that such change of affiliation be made on the registration records in the manner provided by law, so help me God.

Upon receipt of the required oath, the county board of elections shall immediately change the record of the registrant's party affiliation, or unaffiliated status, to conform to that stated in the oath. Thereafter, the voter shall be considered to be registered and qualified to vote in accordance with the change.

Provided that in the event that a registrant has the record of his party affiliation or unaffiliated status changed later than the 21st day (not including Saturdays and Sundays) before a primary, the registrant shall not be entitled to vote in that primary.

N.C.G.S. §§ 163–96 through 163–98 provide:

§ 163–96. "Political party" defined; creation of new party.

(a) Definition. — A political party within the meaning of the election laws of this State shall be either:

(1) Any group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least ten percent (10%) of the entire vote

cast in the State for Governor or for presidential electors; or

(2) Any group of voters which shall have filed with the State Board of Elections petitions for the formation of a new political party which are signed by registered voters in this State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor. Also the petition must be signed by at least 200 registered voters from each of four congressional districts in North Carolina. To be effective, the petitioners must file their petitions with the State Board of Elections before 12:00 noon on the first day of June preceding the day on which is to be held the first general State election in which the new political party desires to participate. The State Board of Elections shall forthwith determine the sufficiency of the petitions filed with it and shall immediately communicate its determination to the State chairman of the proposed new political party.

(b) Petitions for New Political Party. — Petitions for the creation of a new political party shall contain in the heading of each page of the petition in bold print or all in capital letters the words: "THE UNDERSIGNED REGISTERED VOTERS IN _____ COUNTY HEREBY PETITION FOR THE FORMATION OF A NEW POLITICAL PARTY TO BE NAMED _____ AND WHOSE STATE CHAIRMAN IS _____, RESIDING AT _____ AND WHO CAN BE REACHED BY TELEPHONE AT _____. THE SIGNERS OF THIS PETITION INTEND TO ORGANIZE A NEW POLITICAL PARTY TO PARTICIPATE IN THE NEXT SUCCEEDING GENERAL ELECTION."

All printing required to appear on the heading of the petition shall be in type no smaller than 10 point or in all capital letters, double spaced typewriter size. In addition to the form of the petition, the organizers and petition circulators shall inform the signers of the general purpose and intent of the new party.

The petitions must specify the name selected for the proposed political party. The State Board of Elections shall reject petitions for the formation of a new party if the name chosen contains any words that appears in the name of any existing political party recognized in this State or if, in the Board's opinion, the name is so similar to that of an existing political party recognized in this State as to confuse or mislead the voters at an election.

The petitions must state the name and address of the State chairman of the proposed new political party.

The validity of the signatures on the petitions shall be proved in accordance with one of the following alternative procedures:

(1) The signers may acknowledge their signatures before an officer authorized to take acknowledgements, after which that officer shall certify the validity of the signatures by appropriate notation attached to the petition, or

(2) A person in whose presence a petition was signed may go before an officer authorized to take acknowledgements and, after being sworn, testify to the genuineness of the signatures on the petition, after which the officer before whom he has testified shall certify his testimony by appropriate notation attached to the petition.

Each petition shall be presented to the chairman of the board of elections of the county in which the signatures were obtained, and it shall be the chairman's duty:

(1) To examine the signatures on the petition and place a check mark on the petition by the name of each signer who is qualified and registered to vote in his county.

(2) To attach to the petition his signed certificate

a. Stating that the signatures on the petition have been checked against the registration records and

b. Indicating the number found qualified and registered to vote in his county.

(3) To return each petition, together with the certificate required by the preceding subdivision, to the person who presented it to him for checking.

The group of petitioners shall submit the petitions to the chairman of the county board of elections in the county in which the signatures were obtained no later than 5:00 P.M. on the fifteenth day preceding the date the petitions are due to be filed with the State Board of Elections as provided in subsection (a)(2) of this section. Provided the petitions are timely filed, the chairman of the county board of elections shall require a fee of five cents (5¢) for each signature appearing and shall proceed to examine and verify the signatures under the provisions of this subsection. Verification shall be completed within two weeks from the date such petitions are presented and the required fee received.

§ 163-97. Termination of status as political party.

When any political party fails to poll for its candidate for governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for governor or for presidential electors at a general election, it shall cease to be a political party within the meaning of the primary and general elections laws and all other provisions of this Chapter.

§ 163–97.1. Voters affiliated with expired political party.

The State Board of Elections shall be authorized to promulgate appropriate procedures to order the county boards of elections to change the registration affiliation of all voters who are recorded on the voter registration books as being affiliated with a political party which has lost its legal status as provided in G.S. 163–97. The State Board of Elections shall not implement the authority contained in this section earlier than 90 days following the certification of the election in which the political party failed to continue its legal status as provided in G.S. 163–97. All voters affiliated with such expired party shall be changed to "unaffiliated" designation by the State Board's order and all such registrations shall be entitled to declare a political party affiliation as provided in G.S. 163–74(b).

§ 163–98. General Election participation by new political party.

In the first general election following the date on which a new political party qualifies under the provisions of G.S. 163–96, it shall be entitled to have the names of its candidates for State, congressional, and national offices printed on the official ballots, but it shall not be entitled to have the names of candidates for other offices printed on State, district, or county ballots at that election.

For the first general election following the date on which it qualifies under G.S. 163–96, a new political party shall select its candidates by party convention. Following adjournment of the nominating convention, but not later than the first day of July prior to the general election, the president of the convention shall certify to the State Board of Elections the names of persons chosen in the convention as the new party's candidates for State, congressional, and national offices

in the ensuing general election. The State Board of Elections shall print the names thus certified on the appropriate ballots as the nominees of the new party.

Article 22A of Chapter 163 provides, in part:

Article 22A

Regulating Contributions and Expenditures in Political Campaigns

§ 163–278.6. Definitions.

When used in this Article:

(1) The term "board" means the State Board of Elections with respect to all candidates for State and multi–county district offices and the county board of elections with respect to all candidates for single–county district, county and municipal offices. . . .

* * * *

(4) The term "candidate" means any individual who, with respect to a public office listed in G.S. 163–278.6(18), has filed a notice of candidacy or a petition requesting to be a candidate, or has been certified as a nominee of a political party for a vacancy, or has otherwise qualified as a candidate in a manner authorized by law. Status as a candidate for the purpose of this Article continues if the individual is receiving contributions to repay loans or cover a deficit or is making expenditures to satisfy obligations from an election already held.

* * * *

(6) The terms "contribute" or "contribution" means any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever . . . and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make a contribution, in support of or in opposition to any candidate, political committee, referendum committee, or political party.

* * * *

(8) The term "election" means any general or special election, a first or second primary, a run–off election, or an election to fill a vacancy. The term "election" shall not include any local or statewide referendum.

(9) The term "expend" or "expenditure" mean any purchase, advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever . . . and any contract, agreement, promise or other obligation, whether or not legally enforceable to make an expenditure, in support of or in opposition to any candidate, political committee, referendum committee, or political party.

* * * *

(14) The term "political committee" means a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election or which accepts

contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination or election of any candidate at any election, or which receives contributions to repay loans or cover a deficit, or which makes expenditures to satisfy obligations of any election already held. The term includes, without limitation, any political party's State, county, or district executive committee.

(15) The term "political party" means any political party organized and existing in this State, whether or not that party is recognized under the provisions of G.S. 163–96.

(16) The term "political purpose" means any purpose in aid of seeking to influence an election or of a political party or candidate.

* * * *

(19) The term "treasurer" means an individual appointed by a candidate, political committee, or referendum committee as provided in G.S. 163–278.7. . . .

§ 163–278.7. Appointment of political treasurers.

(a) Each candidate, political committee, and referendum committee shall appoint a treasurer and, under verification, report the name and address of the treasurer to the Board. . . .

(b) Each appointed treasurer shall file with the Board at the time required by G.S. 163–278.9(a)(1) a statement or organization that includes:

(1) The Name, Address and Purpose of the Candidate, Political Committee, or Referendum Committee. . . .

(2) The names, addresses, and relationships of affiliated or connected candidates, political committees, referendum committees, political parties, or similar organizations;

(3) The territorial area, scope, or jurisdiction of the candidate, political committee, or referendum committee;

(4) the name, address, and position with the candidate or political committee of the custodian of books and accounts;

(5) The name and party affiliation of the candidate(s) whom the committee is supporting or opposing, and the office(s) involved;

(6) The name of the political committee or political party being supported or opposed if the committee is supporting the ticket of a particular political or political party;

(7) A listing of all banks, safety deposit boxes, or other depositories used, including the names and numbers of all accounts maintained and the numbers of all such safety deposit boxes used;

* * * *

(c) Any change in information previously submitted in a statement of organization shall be reported to the Board within a 10–day period following the change. . . .

§ 163–278.8. Detailed accounts to be kept by political treasurers.

(a) The treasurer of each candidate, political committee, and referendum committee shall keep detailed accounts, current within not more than seven days after the receiving a contribution or making an expenditure, of all contributions received and all expenditures made by or on behalf of the candidate, political committee, or referendum committee.

(b) Accounts kept by the treasurer of a candidate, political committee, or referendum committee or the accounts of a treasurer or political committee at any bank or other depository listed under G.S. 163–278.7(b)(7), may be inspected . . . by a member, designee, agent, attorney or employee of the Board who is making an investigation pursuant to G.S. 163–278.22.

(c) A treasurer may not accept a contribution of more than one hundred dollars ($100.00) from a nonresident of this State unless the contribution is accompanied by a written statement setting forth the name and address of each contributor.

(d) A treasurer shall not be required to report the name of any resident of this State who makes a total contribution of one hundred dollars ($100.00) or less but he shall instead report the fact that he has received a total contribution of one hundred dollars ($100.00) or less, the amount of the contribution, and the date of the contribution. . . .

(e) All expenditures for media expenses shall be made by check only. All media expenditures in any amount shall be accounted for and reported individually and separately.

(f) All expenditures for nonmedia expenses (except postage) of more than fifty ($50.00) dollars shall be made by check only. . . . All expenditures for nonmedia expenses of more than fifty ($50.00) dollars shall be accounted for and reported individually and separately, but expenditures of less than fifty dollars ($50.00) may be accounted for and reported in an aggregate amount, but in that case the treasurer shall account for and report that he made expenditures of less than fifty dollars ($50.00) each, the amounts, dates, and the purposes for which made. In the case of a nonmedia expenditure required to be accounted for individually and separately by this subsection, if the expenditure was to an individual, the report shall list the name and address of the individual.

(g) All proceeds from loans shall be recorded separately with a detailed analysis reflecting the amount of the loan, the source, the period, the rate of interest, and the security pledged, if any, and all makers and endorsers.

§ 163–278.9. Statements filed with Board.

(a) The treasurer of each candidate and of each political committee shall file under verification with the Board the following reports:

(1) Organizational Report. — The appointment of the treasurer as required by G.S. 163–278.7(a), the statement of organization required by G.S. 163–278.7(b), and a report of all contributions and expenditures not previously reported shall be filed with the Board no later than the tenth day following the day the candidate files his notice of candidacy or the tenth day of the organization of the political committee, whichever occurs first . . .

(2) Preprimary Report. — The treasurer shall file a report with the Board no later than the tenth day preceding the primary election.

* * * *

(4) Preelection Report. — The treasurer shall file a report with the Board no later than the tenth day preceding the general election.

* * * *

(6) Annual Reports. — If contributions are received or expenditures are made during a calendar year, for which no reports are otherwise required by the Article, any and all such contributions and expenditures shall be reported by the last Friday in January of the following year.

(b) Except as otherwise provided in this Article, each report shall be current within seven days prior to the date the report is due and shall list all contributions received and expenditures made which have not been previously reported.

* * * *

§ 163–278.10. Procedure for inactive candidate or committee.

If no contribution is received or expenditure made by or on behalf of a candidate, political committee, or referendum committee during a period described in G.S. 163–278.9, the treasurer shall file with the Board, at the time required by G.S. 163–278.9, a statement to that effect and it shall not be required that any inactive candidate or committee so filing a report of inactivity file any additional reports required by G.S. 163–278.9 so long as the candidate or committee remains inactive.

§ 163–278.10A. Threshold of $1,000.00 for Financial Reports.

(a) Notwithstanding any other provision of this Chapter, a candidate shall be exempted from the reports of contributions, loans, and expenditures required in G.S. 163–278.9(a) . . . if to further his campaign that candidate:

(1) Does not receive more than one thousand dollars ($1,000.00) in contributions, and

(2) Does not receive more than one thousand dollars ($1,000.00) in loans, and

(3) Does not spend more than one thousand dollars ($1,000.00).

To qualify for the exemption from those reports, the candidate's treasurer shall file a certification under oath that he does

not intend to receive in contributions or loans or expend more than one thousand dollars ($1,000.00) to further his campaign. The certification shall be filed with the Board at the same time the candidate files his Organizational Report as required in G.S. 163–278.7 [and] 163–278.9. . . . If the intent to stay within the threshold changes, or if the $1,000.00 threshold is exceeded, the treasurer shall immediately notify the Board and shall be responsible for filing all reports required in G.S. 163–278.9 . . . .

(b) The exemption in this subsection (a) of this section applies to political party committees under the same terms as for candidates, except that the term "to further his campaign" does not relate to a political party committee's exemption, and all contributions, expenditures and loans during an election shall be counted against the political party committee's threshold amount.

* * * * *

§ 163–278.14. No contributions in the names of others; no anonymous contributions; contributions in excess of one hundred dollars.

(a) No candidate, political committee, referendum committee, political party, or treasurer shall knowingly accept any contribution may by any individual or person in the name of another individual or person, or made anonymously except as provided in G.S. 163–278.8(d). If a candidate, political committee, referendum committee, political party, or treasurer receives any such contributions, he shall pay the money over to the Board, by check, and all such moneys received by the Board shall be deposited in the general fund of the State of North Carolina.

(b) No individual person shall give, and no candidate, committee or treasurer shall accept, any monetary contribution in excess of one hundred ($100.00) unless such contribution be made in the form of a check, draft or money order.

* * * *

§ 163-278.15. No acceptance of contributions made by corporations, foreign and domestic.

No candidate, political committee, political party, or treasurer shall accept any contribution made by any corporation, foreign or domestic, regardless of whether such corporation does business in the State of North Carolina.

* * * *

§ 163-278.27. Penalty for violations; duty to report and prosecute.

(a) Any individual, candidate, political committee, referendum committee, treasurer [or] person . . . who violates the provisions of G.S. 163-278.7, 163-278.8, 163-278.9, 163-278.10, [or] 163-278.14 . . . is guilty of a misdemeanor.

(b) Whenever the Board has knowledge of or has reason to believe there has been a violation of any section of this Article, it shall report that fact, together with the accompanying details, to the . . . district attorney.

(c) Upon receipt of such a report from the Board, the appropriate district attorney shall prosecute the individual or persons alleged to have violated a section or sections of this Article.

N.C.G.S. § 105–159.1 provides, in part:

§ 105–159.1. Designation of tax by individual to political party.

(a) Every individual whose income tax liability for the taxable year is one dollar ($1.00) or more may designate on his or her income tax return that one dollar ($1.00) of the tax shall be credited to the North Carolina Political Parties Financing Fund. . . . Amounts credited to the Fund shall be allocated among the political parties on a pro rata basis according to their respective party voter registrations as determined by the most recent certification of the State Board of Elections. As used in this section, the term "political party" means one of the following that has at least one percent (1%) of the total number of registered voters in the State:

(1) A political party that at the last preceding general State election received at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors.

(2) A group of voters who by July 1 of the preceding calendar year, by virtue of a petition as a new political party, had duly qualified as a new political party within the meaning of Chapter 163 of the General Statutes.

(2)

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

NO. 95-1196

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SCOTT McLAUGHLIN, et al.,
Petitioners,

v.

NORTH CAROLINA BOARD OF ELECTIONS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The procedural history of the case is accurately stated in the Petition.

II. STATEMENT OF THE FACTS

The facts are accurately stated in the Petition.

III. SUMMARY OF THE ARGUMENT

A. Statutory schemes that allow groups organized for political purposes to become recognized political parties and gain access to the ballot by filing petitions with signatures equal to two percent (2%) or less of those who voted for governor or president and that require a ballot qualified party to obtain ten percent (10%) of the votes for governor or president to remain a recognized political party and retain ballot access have consistently passed constitutional muster in all federal courts. Such schemes reasonably carry out a state's legitimate interest to assure the integrity of its electoral process by eliminating ballot clutter and assuring that all parties listed on the ballot have a modicum of support. A higher disaffiliation requirement than an entrance requirement is not *per se* unconstitutional where it applies equally to all parties and it does not freeze out future access. The historical record shows that parties that have lost ballot access in North Carolina can and do regain it through the petitioning process. Petitioners have failed to show that North Carolina's scheme is constitutionally suspect.

B. When a political party loses all status as a recognized party, states that conduct closed primaries may constitutionally require that the affiliation of the defunct party's registrants be changed to either a recognized party or to unaffiliated. To hold otherwise would leave the registration lists cluttered with minor, unrecognized party affiliates that would create needless burdens in administering the closed primary law. A defunct political party has no constitutional right to have a state promote it by keeping records of its affiliates when these records serve no state interest. There is no conflict in the Circuits on these basic propositions.

IV. REASONS FOR DENYING THE WRIT

A. THE TEN PERCENT (10%) BALLOT RETENTION REQUIREMENT IS NOT PER SE UNCONSTITUTIONAL AND IT IS REASONABLE WITHIN THE CONTEXT OF THIS CASE TO PROTECT A LEGITIMATE STATE INTEREST OF PROTECTING THE INTEGRITY OF THE ELECTION PROCESS.

The issue presented by Petitioners is whether the North Carolina scheme that makes ballot retention more rigorous than ballot access passes constitutional muster within the context of decided cases and the total statutory scheme. Their position is based upon the comment in *Storer v. Brown*, 415 U.S. 724, 737 (1994), that "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." The District Court and the Court of Appeals concluded the retention rule did pass muster.

It is beyond dispute that the two percent (2%) requirement to obtain initial ballot access passes constitutional muster. It satisfies the legitimate state interest of insuring the integrity of the election process by reducing ballot clutter and granting access only to parties that have demonstrated a significant modicum of support. *Jenness v. Fortson*, 403 U.S. 431 (1971), and *American Party of Texas v. White*, 415 U.S. 767 (1974).

North Carolina's test for ballot retention demands that a recognized, ballot qualified party "at the last preceding

general State election, [poll] for its candidate for Governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors." N.C. GEN. STAT. § 163-96(a)(1).

The statutory scheme mandates that failure to poll the requisite ten percent (10%) will carry the following consequences:

(1) Total loss of status as a political party qualified to have the names of its candidates printed on the ballot. N.C. GEN. STAT. § 163-97.

(2) Total loss of the right of individual members of the party to have their affiliation with the defunct party shown on the registration rolls. N.C. GEN. STAT. § 163-97.1.

(3) Total loss of the right of the defunct party to receive free lists of names of registered voters from the county boards of elections, N.C. GEN. STAT. § 163-66.

(4) Total loss of the right to receive public funds contributed by taxpayers. N.C. GEN. STAT. § 163-278.41 and N.C. GEN. STAT. § 105-159.1.

Gaining or losing status as a recognized political party does not affect a group's duty to report and disclose political contributions and expenditures under laws that regulate contributions and expenditures in political campaigns. Political activity, not ballot status, triggers the reporting and disclosure provisions. N.C. GEN. STAT. §§ 163-278.6 through -278.40I.

The prerequisite ten percent (10%) to retaining recognition applies equally to all political parties. Thus, if either the Democratic or Republican party failed to poll the requisite vote, either would lose total recognition and ballot access. The assumption that these "major" parties will always obtain commanding percentages, remain recognized and have ballot access is belied by history. The Federalist Party and the Whig Party, major parties in their day, each became defunct. This record presents no evidence or reason to suppose that the same fate could not befall the two "major" parties.

Two-tier schemes that require a party to exhibit a greater showing of support to remain on the ballot than to get on the ballot initially have been upheld in numerous cases by this Court and lower federal courts. *Jenness v. Fortson*, *supra*, (5% access, 10% retention); *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982), *cert. denied* 461 U.S. 13 (1983) (5% access, 10% retention; 10% retention not unconstitutional *per se*); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985) (.5% access requirement for statewide office, 10% retention); *Rainbow Coalition of Oklahoma v. The Oklahoma State Election Board*, 685 F. Supp. 1193 (W.D. Okl. 1987), *aff'd* 844 F.2d 740 (10th Cir. 1988) (5% access, 10% retention); *Socialist Workers Party v. Hechler*, 696 F. Supp. 190 (S.D.W.Va. 1988), *aff'd in part*, 890 F.2d 1313 (4th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (1% access, 10% retention); *Patriot Party of Pennsylvania v. Mitchell*, 826 F. Supp. 926 (E.D. Pa.), *aff'd* 9 F.3d 1540 (3rd Cir. 1993) (2% access, 15% retention); *Libertarian Party of Alabama v. Wallace*, 586 F. Supp 399 (M.D. Ala. 1984) (1% access, 20% retention)

Petitioners recognize that a state has a legitimate interest to protect the integrity of its electoral process by reducing ballot clutter. One way to achieve this goal is to require those who seek to be on the ballot to demonstrate a significant modicum of support. They argue, however, that a ten percent (10%) retention requirement rises above a "modicum" and becomes "onerous." They ask this Court to adopt, as a constitutional requirement, that a retention requirement cannot exceed the access percentage.

The error of Petitioners' position is demonstrated by the following observation of the Tenth Circuit in *Libertarian Party of Florida v. State of Florida*, 710 F.2d 970 (11th Cir. 1983), a case involving an attack on an access.

> Obviously any percentage or numerical requirement is "necessarily arbitrary." *American Party of Texas v. White*, 415 U.S. at 783, 94 S.Ct. at 1307. Once a percentage or number of signatures is established, it would probably be impossible to defend it as either compelled or least drastic. At any point, probably a fraction of a percentage point less, or a few percentage points less would not leave the interests the state unprotected. Any numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all. This not the thrust of the [Supreme] Court's teachings however. . . . The focal point of this inquiry is whether a "reasonably diligent [] candidate [can] be expected to satisfy the . . . requirements." *Storer v. Brown*, 415 U.S. at 783, 94 S.Ct. at 1285. Thus, the test is

> whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, *i.e.*, whether the statute unreasonably encroaches on ballot access.

Id. at 793.

Petitioners have failed to present any compelling arguments that a ten percent (10%) figure is unreasonable or irrational. Their sole argument is that because it is higher than the access requirement, it *ipso facto* becomes unreasonable, a view rejected by all courts to date; that they are somehow no longer able to advocate their views and that they suffer other statutory disadvantages.

Its patent that, regardless of ballot status, Petitioners may continue to advocate their ideas in any lawful manner. The other consequences of loss of status are minimal and logically follow. Thus, if a party is not legally recognized, it would be a wasteful and unlawful expenditure of public funds to allow it to collect money from the public fund. It would be a similar waste of public funds to provide free lists (lists can always be obtained by payment of the "actual costs" to the agency) and when a party ceases to have legal status there is no reason to clutter the public records with data about affiliation with a defunct group.

A sound rule of reason has been articulated in cases involving the apportionment of state electoral districts. Population deviations of up to ten percent (10%) have been considered to be *de minimus*. In *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), the view was expressed that

substantial equality in population in electoral districts does "not in any commonsense way depend upon eliminating the insignificant population variations involved." Thus a retention percentage of ten per cent (10%) or less can easily be considered *de minimus*. When a retention percentage is in this range, the judgement of the state must be given great weight unless there is a clear showing that the percentage freezes out minor parties.

The historical record before the District Court and the Court of Appeals shows that the Libertarian Party and other minor parties have been able to obtain ballot access over the years, compelling evidence that the ten percent (10%) retention requirement has not operated to freeze out minor parties.

The historical record also shows the very low percentages of voters and financial contributions attracted by libertarian ideas over almost twenty years of advocacy and ballot access. (Ap, A-7, A-43 and A-44) Ultimately, to succeed, a political party must get a plurality of the registered voters to accept its views and elect its candidates. It is not disputed that those of libertarian belief have been free, since the beginning, to advocate their views in all non-electoral contexts. The North Carolina scheme allows Petitioners to obtain early access to the ballot and participate in two general elections. With a potential of over three years of ballot access, it is not unreasonable nor unduly restrictive to require the party to poll ten percent (10%) of the vote in a presidential year.

It is a truism that an idea whose time has come is irresistible and a group swept along by a new idea is equally irresistible. An example is the Ross Perot phenomenon in

1992 when Perot, running as an unaffiliated candidate, obtained ballot access and polled around 15% of the total vote for president in North Carolina. (Ap, A-55) (If Perot had run as a member of an organized political party, it would remain recognized today.) The historical record demonstrates that the real complaint of the Libertarian Party and its membership is that the ideas of Libertarianism have not been accepted.

The Respondents urge this Court to reject any absolute retention percentage and to deny the Petition as to this issue.

B. There Is No Conflict Between The Fourth And Tenth Circuits On The Issue Of Changing The Public Registration Records As To The Affiliation Of Registered Voters With A Defunct Party.

The Fourth Circuit properly did not cite or consider *Baer v. Meyer*, 782 F.2d 471 (10th Cir. 1984). *Baer* involved a Colorado statutory scheme that distinguished between "political parties" (those whose gubernatorial candidates received the highest and next highest number votes at the last election) and "political organizations" (those who had obtained ballot access but failed to poll the requisite numbers to become a political party.) A "political organization", nevertheless, under earlier decisions of the Colorado Supreme Court, remained a recognized political entity if it had achieved ballot access in the past. The Colorado statutory scheme did not allow registrants on its rolls to show affiliation with "political organizations." This

practice was struck down because political organizations were recognized entities under Colorado law and there was a minimal administrative burden in having registration records include all lawfully recognized political groups.

The decision in *Baer* is limited to its own unique facts. Thus, four years after *Baer*, the Tenth Circuit reiterated the notion that "The state has a substantial interest in preventing 'the purely frivolous and insubstantial attempts to designate party affiliation on the registration form.' *Baer*, 728 F.2d at 475." *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 747 (10th Cir. 1988). Nevertheless, *Baer* was not deemed controlling and the Oklahoma disaffiliation scheme was upheld. "While an administrative burden in and of itself would not be sufficient to justify infringing important associational rights, we must consider it together with the state's interest in controlling party registration of tiny fractional interests." *Id.* at 747. This shows clearly that *Baer* is limited to its unique facts and it has not been extended beyond them. It is, therefore, not in conflict with the Fourth Circuit's decision.

There is only one way to become and remain a recognized "political party" in North Carolina which is to meet the ballot access and retention criteria. When any group fails to meet these criteria, it ceases to be a lawfully recognized political party and becomes a voluntary, albeit a politically orientated, association. Thus, in North Carolina a group is either a political party or it is not; it never assumes some other legal status as a political organization. Accordingly, *Baer* has no application to this scheme.

Later, another circuit declined to follow *Baer*, followed *Rainbow Coalition* and affirmed an Iowa scheme

that required disaffiliation if a party became defunct when it failed to poll two percent (2%) of the votes cast for president or governor. *Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir. 1990). As a part of its rationale, the Court noted that Iowa had closed primaries so that the "restriction on allowing registrants to indicate their preference for or affiliation with a political party is related to the state's interest in enabling political parties to conduct their closed primaries, it is not related to the burdening of [a minor party's] opportunities." *Id.* at 1181.

North Carolina conducts primary elections for all ballot qualified parties to select nominees for the general election. N.C. GEN. STAT. §§ 163-104 through -116. (A newly qualified party nominates by convention for the first general election and by primary thereafter. N.C. GEN. STAT. § 163-98) The right to vote in a primary election is limited by law to registrants who have declared and had their affiliation recorded on the voter registration records. N.C. GEN. STAT. § 163-59. A ballot qualified political party may, however, permit persons registered as "unaffiliated" to vote in its primary. N.C. GEN. STAT. § 163-74(a1).

Elections officials maintain data on the party affiliation of registered voters in order to administer the closed primary process. As a by-product of this principal purpose, the registration records provide information on party affiliation. Registration records are public records accessible to all under the public records law; the records may be examined for free and copies obtained by reimbursing the custodian the "actual cost" involved in reproducing the record. N.C. GEN. STAT. §§ 132-1 through -9. Recognized political parties are allowed to obtain free lists of the names of registrants and their affiliation at

specified intervals in the elections cycle. N.C. GEN. STAT. § 163-69.

The North Carolina scheme is different from Colorado's and quite similar to Iowa's; it does not recognize any political organization that fails to remain ballot eligible and it is put in place to administer a closed primary. To continue to maintain a list of members of defunct parties is a needless administrative burden on elections officials. It is a legitimate state interest to keep these administrative burdens to a minimum. *Baer, supra*; *Rainbow Coalition, supra*. A scheme that permits "voters to register only as members of recognized political parties or as Independent . . . does not prohibit . . . citizens from registering to vote, and does not prohibit registered voters from voting for candidates of their choice. . . . [It] simply . . . control[s] frivolous and insubstantial party registration." *Rainbow Coalition v. Oklahoma State Election Board*, 685 F. Supp. 1193, 1199 (W.D. Okl. 1987). Moreover, "Once a recognized political party ceased to exist, it would follow that its members can no longer be carried on the voter rolls as registered members of such defunct party." *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375, 1379 (10th Cir. 1982, *cert. denied*, 461 U.S. 913 (1983). This is because "[a]t this time, the only reason for the state not to eliminate the party from the registration records would be to help promote the party. This is not a permissible state purpose." *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373, 387 (M.D.N.C. 1994) (Ap, p A-73)

In summary, *Baer* is not in conflict with the Fourth Circuit's decision in Petitioners' case and the disaffiliation requirement passes constitutional muster.

V. CONCLUSION

For all of the foregoing reasons, the Respondents respectfully submit that the North Carolina statutory scheme passes constitutional muster. The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the District Court should be denied.

This the 22nd day of February 1996.

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(3)

Supreme Court, U.S.
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FEB 20 1996
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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE COMMITTEE FOR PARTY RENEWAL AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CONSENT TO FILING BRIEF AMICUS CURIAE

All parties to the instant cause have consented to the filing of this brief of the Amicus Curiae as evidenced by the filing of the Consent to Filing of Brief Amicus Curiae herein.

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INTEREST OF THE AMICUS CURIAE

The Committee for Party Renewal is a voluntary, bipartisan association of some 500 political scientists and practitioners committed to strengthening political parties in the United States. Since its inception in 1975, the Committee has worked towards revitalizing and rebuilding political parties. This effort is founded in the belief that political parties are essential to unify and give coherence to the American political system, and to maintain an effective democracy. As part of its goal, the Committee has urged that minor political parties, as well as the two major parties, be able to compete freely in U.S. elections. The Committee's Principles, published in 1977, hold that "without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy. Parties are indispensable to the realization of democracy."

SUMMARY OF ARGUMENT

This Court has long recognized that state restrictions on ballot access and retention burden both "the rights of individuals to associate for the advancement of political belief, and the right of qualified voters . . . to cast their votes effectively." *Anderson v Celebrezze*, 460 U.S. 780, 787 (1983). However, although the Court has decided many cases dealing with ballot access restrictions, the Court has never directly addressed the issue of ballot retention standards.

States such as North Carolina have justified high ballot retention standards by citing the need for orderly

elections and the need to prevent voter confusion, ballot overcrowding, and the elimination of "frivolous" candidacies. *Munro v Socialist Workers Party*, 479 U.S. 189 (1986). However, in those states with ballot retention standards of ten percent or more, such as North Carolina, more than forty percent of all state legislative elections are going uncontested. Incumbent legislators have imposed ballot retention standards, often coupled with difficult ballot access petition requirements, as in North Carolina, which have gone beyond a legitimate interest in orderly elections and which have had the effect of eliminating political competition. Nationwide, more than one-third of all state legislative races are routinely uncontested. Ballots are not overcrowded. They are undercrowded.

North Carolina has imposed a retention requirement of ten percent, which must be won in one of the races in which third parties are least likely to poll ten percent of the votes, even though they may poll far more than ten percent of the vote in many other races. Not only most states, but other western democracies, recognize that parties which poll far less than ten percent of the vote are a significant part of the democratic system.

The Court should grant the Petition in order to address for the first time the issue of ballot retention requirements, and to examine both the state interest in restrictive ballot access laws, and the burden on First and Fourteenth Amendment rights, in light of the demonstrable undercrowding of state election ballots.

ARGUMENT FOR ALLOWING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION IN ORDER TO CONSIDER, FOR THE FIRST TIME, A CHALLENGE TO BALLOT RETENTION LEVELS

This Court has long recognized that state restrictions on ballot access and retention burden both "the rights of individuals to associate for the advancement of political belief, and the right of qualified voters, regardless of political persuasion, to cast their votes effectively." *Anderson v Celebrezze,* 460 U.S. 780, 787 (1983). Moreover, the right to vote is "heavily burdened if that vote may be cast only for one or two parties at a time when other parties are clamoring for a place on the ballot." *Williams v Rhodes,* 393 U.S. 23, 31 (1968).

In the twenty-eight years since *Williams v Rhodes,* the Court has gradually fleshed out the permissible boundaries of legislative action pertaining to a variety of state ballot access restrictions, including total signature requirements for obtaining a place on the ballot, *Munro v Socialist Workers Party,* 479 U.S. 189 (1986); *American Party of Texas v White,* 415 U.S. 767 (1974); distribution of signature requirements across state counties, *Moore v Ogilvie,* 394 U.S. 814 (1969); early deadlines for filing, *Anderson v Celebrezze,* 460 U.S. 780 (1983); filing fees, *Lubin v Panish,* 415 U.S. 709 (1974); "sore loser" laws, *Storer v Brown,* 415 U.S. 724 (1974); and anti-communist oaths, *Communist Party v Whitcomb,* 414 U.S. 441 (1974).

In *Jenness v Fortson,* 403 U.S. 431 (1971), the Court noted in dicta that Georgia's twenty percent retention level was not impermissible within the context of a ballot access system that, the Court found, did not "operate to

freeze the status quo." *Id.* at 438. However, the challenge in *Jenness* was not to the retention level, but to the petition level, which the petitioners had failed to meet. In *Williams v Rhodes*, on the other hand, the Court struck down Ohio's entire ballot access scheme even though the retention level was just ten percent (the Ohio legislature then lowered the retention level to five percent). Again, however, the specific challenge in *Williams v Rhodes* was to the petition requirement, not to the retention level.

In short, despite dicta running both ways, the Court has never determined whether or not there are levels for a party to retain automatic ballot status beyond which a state may not constitutionally go. *McLaughlin v North Carolina Board of Elections* provides an excellent vehicle for providing state legislatures and lower courts with such guidance.

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO CONSIDER, FOR THE FIRST TIME THE BURDEN OF BALLOT ACCESS RESTRICTIONS ON VOTER RIGHTS, AND THE STATE INTEREST IN THOSE RESTRICTIONS, IN LIGHT OF A GROWING NATIONAL PROBLEM OF UNDERCROWDED BALLOTS.

A. Voters in North Carolina and elsewhere are increasingly denied any meaningful vote due to a limited number of candidates.

Ballot access restrictions may be justified by a state's interest in preventing voter confusion, avoiding ballot overcrowding, and eliminating "frivolous" candidacies. *Munro v Socialist Workers Party*, 479 U.S. at 195. However,

the Court has equally recognized that the restrictions which may be placed on voters are limited. "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' " *Anderson v Celebrezze,* 460 U.S. at 793 (footnote omitted). Restrictions which place "severe" burdens upon fundamental constitutional rights are subject to strict scrutiny, and so must be narrowly drawn to advance a state interest of compelling importance. *Burdick v Takushi,* 504 U.S. 428 (1992). The Court of Appeals found that the burden placed on Constitutional rights by North Carolina's ballot access laws are "undoubtedly severe," thus making strict scrutiny appropriate in this case. *McLaughlin v North Carolina Board of Elections,* 65 F.3d 1215, 1221 (4th Cir. 1995).

In upholding the North Carolina statutory scheme, neither the district court nor the court of appeals considered the validity of the state interest in light of the state's demonstrably *undercrowded* ballots. In fact, in North Carolina and throughout the country, large numbers of races go totally uncontested.

In the general elections of November 1994, 170 North Carolina legislative seats were up for election. There were no third party candidates for any office on the ballot, and only one independent candidate for any state or federal office. Furthermore, there were 27 instances in which the Democrats failed to nominate for a legislative seat, and 51 instances in which the Republicans failed to nominate for a legislative seat. *Dems., Reps. Failed to Nominate in '94,* Ballot Access News, June 1, 1995 at 5 (attached as Appendix A). Thus, altogether 78 of 170 seats for the North

Carolina legislature went uncontested. For 1996, according to the official list of primary candidates for the legislature, no Democrat filed for 26 seats and no Republican filed for 28 seats, for a total of 54 seats with no Democrat-Republican contest.

This problem of undercrowded ballots is not limited to North Carolina. Nationwide, in the 45 states which elected legislatures in 1994, thirty-six percent (2,209 of 6,167) of all regularly-scheduled state legislative elections were uncontested by one of the two major parties. *Id.* These numbers are not atypical – in 1992, 33% of regularly-scheduled elections for state legislatures had no major party contest. In 1990, the figure was 36%, and in 1988, 37%. *Id.* Furthermore, in states with ballot retention levels of ten percent or more, such as North Carolina, the problem is most acute: in Alabama, Georgia and Oklahoma, each with a retention level of ten percent or more for the legislature[1], more than half of all state legislative elections were not contested by at least one major party in 1994. *Id.* These figures are powerful evidence that state legislative bodies have gone far beyond the level necessary to prevent voter confusion and overcrowding of state election machinery.

"(V)oters can assert their preferences only through candidates or parties or both." *Lubin v Panish*, 415 U.S. at 716. Voters who are presented with only one candidate at the time of the general election cannot, realistically, assert

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[1] See Ala. Code § 17-16-2 (1995); Ga. Code Ann. § 21-2-2(21) (Supp. 1995); Okla. Stat. Ann. tit. 26, § 1-109 (1991).

any preference. Their right to vote has become meaningless. This Court has been appropriately cautious about interjecting itself into issues of apportionment and the distribution of political power. Nevertheless, the Court has not feared to step in when it appears that the "ins" are attempting to use the state's electoral machinery to deny an effective voice to the "outs". *See, e.g., Gomillion v Lightfoot,* 364 U.S. 339 (1960) (striking down effort to redraw city boundaries to exclude black voters); *Reynolds v Sims,* 377 U.S. 533 (1964) (requiring legislature to reapportion districts); *Harper v Virginia Board of Elections,* 383 U.S. 663 (1966) (striking down poll tax); *Williams v Rhodes,* 393 U.S. 23, 31-32 (1968) (striking down Ohio statute that locked in Republicans and Democrats to exclusion of other parties); *Kramer v Union Free School District No. 15,* 395 U.S. 621 (1969) (restriction of voting to those owning or leasing taxable property within district, or with children in local schools, was unconstitutional); *Davis v Bandemer,* 478 U.S. 109 (1986) (recognizing partisan gerrymandering as a justiciable issue).

The North Carolina state legislature, and the legislatures in many other states, all made up of Republicans and Democrats, are asserting state interests in maintaining statutory schemes which limit access to the ballot, even though more than one-third of their members in any given election year will face no ballot competition at all. Because of the legislature's direct self-interest in raising ballot access restrictions above that needed for legitimate state interests, it is incumbent on the court to review such activity under the highest level of scrutiny. The problems presented by high retention levels are not subject to self-correction because of the distorting effect such laws have

on the democratic process. Voters are unlikely to unseat legislators who support high retention levels because the laws deny them any alternative candidates to choose from. Legislators are unlikely to build coalitions with opponents of high retention standards because the purpose of lowering the retention standard is to be able to vote for candidates other than those already in office. Thus, the court should assure not only that no one is denied an effective vote for no reason, but that there ought to be a very convincing reason for burdening the right to vote.

B. North Carolina ballot access and retention requirements are significantly responsible for the problem of undercrowded ballots.

Third party activity can help to ameliorate the problem of uncontested legislative elections. However, the North Carolina ballot access laws have worked to quash third party (and independent) political activity.

A court should review the effect of ballot access restrictions "as a whole". *Williams v Rhodes*, 393 U.S. 23 at 34. Thus, although the requirements to get a new party on the ballot in North Carolina are not being challenged, it is relevant that they are so severe.

North Carolina's two percent petition requirement is higher than most states; after California and Florida, North Carolina requires more signatures than any other state for a new party to qualify for the presidential ballot (see Appendix B). Under the current law, passed in 1983, only two third parties have successfully petitioned in North Carolina: the New Alliance Party in 1988, and the

Libertarian Party in 1992 (although the Socialist Workers and Libertarian Parties appeared on the ballot in 1984, they did so by virtue of completing the old 5,000-signature petition before the 1983 law went into effect). None of these parties was able to retain ballot status, through vote totals or petition, in the next election. *See McLaughlin v North Carolina Board of Elections*, 850 F. Supp. 373, 377-78 (M.D.N.C. 1994).

In addition to imposing difficult petitioning requirements, North Carolina is one of only eight states requiring vote totals in excess of five percent to retain automatic ballot status (see Appendix C).[2] In nations with "winner-take-all" elections, such as the United States, it is particularly difficult for any third party to poll ten percent in a statewide race. This is because winner-take-all election systems invariably lead to a two-party system. *See, e.g.*, Douglas Rae, The Political Consequences of Electoral Laws 92 (1971). Because a party gets nothing until it can carry a plurality within an electoral unit, the system creates a strong incentive for parties to coalesce until only two major parties are left. Similarly, voters have a powerful incentive to vote only for a candidate who "can win". *Id.* at 94-95. Voters who are not intensely attracted to a candidate's principles will, in a three or more candidate race, tend to vote for one of the two candidates considered to have the best chance to win, though that candidate would not otherwise be their first choice. At the level of a gubernatorial race, where the two major parties

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[2] Georgia requires a 1% vote retention for a party to remain qualified for statewide office, but a 20% vote retention for a party to remain qualified for district and county office.

always compete, this makes it extremely unlikely that a third party will attract as much as ten percent of the vote. This is true even though that party might gain twenty or more percent of the vote, and even elect individuals to lower offices, particularly where the race would otherwise go uncontested.

Therefore, when a state such as North Carolina sets its retention requirement at ten percent of the gubernatorial total, it virtually guarantees that third parties will not be able to retain a place on the ballot for any office. This means that these parties will be forced to repetition, election after election, even to appear on the ballot. This is true so long as their gubernatorial candidate is kept below ten percent, even though the third party might even be able to elect members of the legislature in some districts. If the petition requirement to get on the ballot were lenient, the problem of retention would not be so serious. But in a state such as North Carolina, where more than 50,000 signatures are required by a mid-May filing date, the combination of difficult petitioning standard and high retention standard means that, invariably, there will be few or no third parties on the ballot to provide competition, despite the fact that one or the other major party fails to run a candidate in forty percent of state legislative races. Even third parties which are capable of completing the petition requirement are generally exhausted by the need to submit the petition repeatedly. Consequently, even those with some significant support will, over time, tend to cease to appear on the ballot.

Most states understand that third parties, though they provide active competition in some districts and an

important outlet for disgruntled voters elsewhere, cannot poll ten percent of the vote for an important statewide office. Thus, most states set the retention requirement considerably below ten percent. Indeed, most states recognize that a third party capable of polling two to three percent deserves automatic ballot status in the next election. See Appendix B.

Similarly, other western democracies invariably recognize that parties which poll less than ten percent of the vote may be significant. All but two countries in Europe use proportional representation, and all countries wholly in Europe which use proportional representation provide for representation in legislative bodies for parties which poll five percent or less. See Matthew Cossolotto, The Almanac of European Politics (1995). This is not to suggest that the United States ought to adopt proportional representation; rather, the above simply makes clear that not only in this country, but throughout Europe, parties are considered significant even though they may poll far less than ten percent of the vote.

North Carolina's combination of a high retention level and difficult petitioning standard has significantly restricted the political participation of third parties and those voters who would vote for them. As a result, there are seldom any third party candidates for the legislature on the North Carolina ballot. The North Carolina legislative scheme seems designed to quash all third party and independent political competition, and not merely to protect the state's legitimate interest in preventing voter confusion and overcrowded ballots. As a result, the state's voters suffer when so many state legislative elections are one-candidate elections. This severe burden on

voter rights is not matched by any legitimate state interest.

This Court should grant McLaughlin's Petition for a Writ of Certiorari. The Court has never considered the question of how much support a third party may be required to demonstrate in order to remain on the ballot for the next election, and has never considered ballot access requirements in light of the ballot undercrowding that has resulted in uncontested elections for more than one-third of all state legislative seats in the United States.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court grant the petition and issue a writ of certiorari to review the judgment of the Fourth Circuit affirming the judgment of the District Court.

Respectfully Submitted,

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DEMS, REPS FAILED TO NOMINATE IN '94

(reprinted from *Ballot Access News*, issue of June 1, 1995, Vol. 11, No. 3)

In the November 1994 elections, either the Republicans or the Democrats failed to run a candidate in 35.8% of all state legislative contests. 1994 was not atypical. In 1992, there was no Democrat or no Republican in 32.8% of the regularly-scheduled state legislative races; in 1990, 35.9%; in 1988, 36.6%.

STATE	SEATS UP	NO DEM.	NO REP.
Alabama	140	14	60
Alaska	50	6	6
Arizona	90	29	18
Arkansas	118	8	67
California	100	0	4
Colorado	83	9	8
Connecticut	187	14	12
Delaware	51	11	13
Florida	142	33	40
Georgia	236	51	109
Hawaii	65	1	20
Idaho	105	52	7
Illinois	139	17	21
Indiana	149	25	15
Iowa	125	32	21
Kansas	125	22	17
Kentucky	119	20	52
Maine	186	17	22
Maryland	188	3	42
Massachusetts	200	20	92
Michigan	148	0	2
Minnesota	136	10	2
Missouri	180	28	40
Montana	128	11	16
Nevada	53	6	6
New Hampshire	424	72	66
New Mexico	71	10	27
New York	211	22	20
North Carolina	170	27	51
North Dakota	122	11	9
Ohio	116	7	4
Oklahoma	125	20	44
Oregon	75	6	7
Pennsylvania	228	40	39
Rhode Island	150	10	60
South Carolina	124	41	43
South Dakota	105	19	14
Tennessee	116	22	35
Texas	181	43	71
Utah	91	13	4
Vermont	180	18	31
Washington	122	12	8
West Virginia	119	5	37
Wisconsin	116	27	21
Wyoming	78	33	9
TOTAL	6,167	897	1,312

Louisiana, Mississippi, Nebraska, New Jersey and Virginia did not elect partisan legislators in 1994 and are omitted.

When any major party nominee captured the opposing major party's nomination as well as his or her own party's nomination, the opposing party is considered not to have a nominee. This happened only in California, New Hampshire, New York, Pennsylvania and Vermont.

APPENDIX B

1996 BALLOT ACCESS HURDLES FOR A NEW PARTY PRESIDENTIAL CANDIDATE

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE		REQUIRED	%
Ala	1% of 1994 gub vote	17-8-2.1		35,973	1.62
Alas	1% of 1992 pres. vote	15.30.025		2,586	.77
Az	1 & 1/3% of 1994 gub. vote	16-801		15,062	.73
Ark	just hold meeting	Att. Gen. Op. 79-102		0	.00
Cal	1% of 1994 gub. vote	elec. code 6430(b)	(reg.)	89,006	.60
Colo	number stated in law	1-4-801(b)		0	.00
Ct	number stated in law	9-453(d)		7,500	.40
Del	.05% of Dec 1995 registration	Title 15, sec 3001	(reg.)	191	.06
Fla	1% of no. of reg. voters as of 1994	103.021(3)		65,596	1.00
Ga	1% of no. of reg. voters as of 1994	21-2-180		30,036	1.00
Hi	1% of no. of 1992 vote cast	Tit. 2, 11-113b(2)(B)		3,829	.78
Id	2% of 1992 pres. vote	34-501(1)(c)(D)		9,644	1.54
Il	number stated in law	Ch. 46, sec. 10-2		25,000	.41
In	2% of 1994 sec of state vote	3-8-6-3		29,822	.97
Io	number stated in law	Title 4, sec. 45.1		1,500	.09
Kan	2% of 1994 gub. vote	25-302(a)		16,418	1.25
Ky	number stated in law	Title 10, sec. 118.315(2)		5,000	.23
La	just pay $500; no petition needed	Title 18, sec. 465C		0	.00
Me	number stated in law	Title 21, sec. 494.5		4,000	.44
Md	number stated in law and A.G. Op.	Att. Gen. Op. Jan. 6, 1984		10,000	.42
Ma	number stated in law	Chap. 53, sec. 6		10,000	.32
Mi	1% of 1994 gub. vote	168.685(1)		30,891	.50
Mn	number stated in law	204B.08		2,000	.07
Ms	just be organized	23-15-1059		0	.00
Mo	number stated in law	Tit. 9, sec. 115.321		10,000	.34
Mt	5% of 1992 gub. winner's vote	13-10-601		10,471	2.04
Neb	1% of 1994 gub. vote	32-526		5,741	.62
Nev	1% of 1994 congress vote	Tit 24, sec 293.1715		3,761	.60
N H	number stated in law	Title 4, sec. 655:42		3,000	.45
N J	number stated in law	19:13-5		800	.02
N M	1/2 of 1% of 1994 gub. vote	1-8-2.B & 1-7-2.A		2,339	.33
N Y	number stated in law	Chap. 17, sec. 6-142		15,000	.17
N C	2% of 1992 gub. vote	163-96(2)		51,904	1.43
N D	number stated in law	16.1-12-02		7,000	1.51
Oh	1% of 1994 gub. vote	3517.01		33,463	.54
Ok	3% of 1992 pres. vote	Title 26, sec. 10-101.2		41,711	2.04
Ore	1.5% of 1994 gub. vote	Tit 23, sec. 248.008(a)		18,316	1.02
Pa	2% of 1995 judge winner's vote	Title 25, sec. 2911		24,425	.42
R I	number stated in law	17-14-7		1,000	.18
S C	number stated in law	7-9-10		10,000	.67
S D	2.5% of 1994 gub. vote	12-5-1		7,792	1.80
Tn	2.5% of 1994 gub. vote	2-1-104(28)(B)		37,179	1.39
Tx	1% of 1994 gub. vote	Elec. code 181.005		43,963	.51
Ut	number stated in law	20-3-38		300	.03
Vt	number stated in law	Title 17, sec. 2402(b)		1,000	.27
Va	one-half of 1%, no. reg. voters, Jan.	24.1-159		15,168	.50
Wa	number stated in law	29.24.030		200	.01
W V	1% of 1988 pres. vote	3-5-23		6,837	.77
Wis	number stated in law	Title 2, sec. 8.20(4)		2,000	.06
Wy	number stated in law	22-4-402(d)		8,000	3.36
DC	1% of no. of reg. voters, July 1996	1-1308(f)	(es)	3,500	.97

"Requirement" shows the number of signatures or registrants to get a new party presidential candidate on the November ballot. "%" means the requirement, divided by the number of registered voters as of fall 1994. All procedures listed above permit the party name to be printed on the ballot. Chart prepared Feb. 15, 1996.

APPENDIX C

WHAT MUST A PARTY DO TO NOMINATE WITHOUT PETITIONING?

State	Must Poll for Which Office?	How Many Votes Needed?	History	Code Cite
Ala	any statewide	20%	1898	17-16-2
Alas	Governor	3%	1994	15.60.010
Az	President or Governor	5% (or have 2/3 of 1% reg.)	1982	16-804A
Ark	President or Governor	3%	1992	7-1-101(1)
Cal	any statewide, gub years	2% of voters who vote	1994	5100a
Colo	Governor	10%	1914	1-1-104(18)
Ct	any (each office separate)	1%	1994	9-372(f)
Del	party's vote irrelevant	must have reg of .05%	1994	3001
Fla	party's vote irrelevant	must have reg. of 5.0%	never	97.021(14)
Ga	any statewide	1% of all voters	1994	21-2-180(2)
Hi	party's vote irrelevant	must have been on 3 elections	1994	11-62(d)
Id	party's vote irrelevant	must have run 3 candidates	1994	34-501(1)(a)
Il	any statewide	5%	1994	10-2
In	Secretary of State	2%	1994	3-8-7-25
Io	President or Governor	2%	1968	43.2
Kan	any statewide	1%	1994	25-302(b)
Ky	President	2%	1980	118.325
La	President	5%	1992	441
Me	President or Governor	5%	1994	321.1
Md	party's vote irrelevant	must have reg. of 10.0%	never	Art 33, 5-1
Ma	any statewide	3%	1994	50-1
Mi	cand. closest to top of ballot	1% of Sec St winner's vote	1994	168.685(3)
Mn	any statewide	5%	1994	200.02.7
Ms	party's vote irrelevant	must be organized	1994	23-1-81(c)
Mo	any statewide, either of last 2	2%	1994	115.013(10)
Mt	any statewide, either of last 2	5% of Gub winner's vote	1994	13-10-601
Neb	President or Governor	5%	1968	32-521
Nev	any	1% of Congress vote	1994	293.1715
N H	any statewide	3% of Gubernatorial vote	1994	652:11
N J	average of assembly cand.	10%	1913	19:1-1
N M	any statewide, either of last 2	.5% of Gub. or Pres. vote	1994	1-7-2(C)
N Y	Governor	poll 50,000 votes (aprox 1%)	1994	1-104.3
N C	President or Governor	10%	1968	163-96(1)
N D	Governor	5%	1914	16.1-11-30
Oh	President or Governor	5%	1968	3517.01
Ok	President or Governor	10%	1968	1-109
Ore	any statewide	1% of Congress vote	1994	248.008(2)
Pa	party's vote irrelevant	must have reg. of 15.0%	never	2872.2(a)
R I	Governor	5%	1994	17-1-2(f)
S C	party's vote irrelevant	must run at least 1 candidate	1994	7-9-10
S D	Governor	2.5%	1994	12-1-3(3)
Tn	any statewide	5%	1968	2-104(27a)
Tx	any statewide	5% (or, 2% for Governor)	1994	181.005(b)
Ut	any	2% of Congress vote	1994	20-3-2(g)
Vt	party's vote irrelevant	must be organized 15 towns	1994	2103(23)
Va	any statewide, either of last 2	10%	1994	24.1-1(7)
Wa	any statewide	5%	1968	29.01.090
W V	Governor	1%	1924	3-1-8
Wis	any statewide, either of last 2	1%	1994	5.62(1b)
Wy	Congress	3%	1994	22-4-301
DC	any districtwide	poll 7,500 votes (aprox 3%)	1994	1-1108h(2)

Only 4 states have a retention requirement based on a party's registration, whereas 41 states & D.C. have a retention requirement based on how many votes a party polled. Threefore, the chart is oriented toward votes. "History" column tells the last year in which any third party met the current standard. No third party in any state has held even 5% of that state's registration, since 1912. There was no such thing as registration data for parties before 1900, since there were no state-conducted party primaries until the 20th century. Chart prepared Feb. 15, 1996. In Georgia, a party which polls a number of votes for any statewide office equal to at least 1% of the number of registered voters, is automatically on the ballot in the next election only for statewide office. To be on automatically for district and county office, it must poll 20% for Governor or for President in the entire U.S.